

QUARTERLY REPORT
of the
ATTORNEY GENERAL
of
ALABAMA

For the Period
From October 1, 1942
Through December 31, 1942
Volume XXIX

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with Code 1940, Title 55, Section 228, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This report covers all opinions rendered by the Attorney General from September 1, 1942, through December 31, 1942.

The Section of the Code referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State, and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Code Section also provides a copy of said Report be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials. If you have any suggestions to make regarding the improvement of the service, we should be glad to receive it. We welcome your criticism.

Very respectfully,
WILLIAM N. McQUEEN,
Attorney General.

WETUMPKA PRINTING CO.
Printers and Publishers
Wetumpka, Ala.
1943

OPINIONS

October 3, 1942

Hon. O. E. Cole, Chairman,
Russell County Commission,
Phenix City, Alabama.

Counties — Conveyances

1. Chairman of County Commission of Russell County not authorized or empowered by local act (Act No. 91, H. 296, approved October 14, 1932, Local Acts, Extra Session 1932, page 35) to execute conveyance to county property.

2. The Russell County Commission may direct the judge of Probate of Russell County to execute deed to county property (Title 12, Section 177, 1940 Code of Alabama).

Opinion by Assistant Attorney General Lurie.

Dear Sir:

Your letter of September 28, 1942, in which you request an official opinion, is as follows:

"The County Commission of Russell County has been called upon to furnish ground for a Health Center to be erected by the United States Government. Please advise me upon the following:

"1. The Act creating the County Commission of Russell County was approved October 14, 1932, General and Local Acts of Extra Session, 1932, at page 35. Section 7 of that Act provides 'That said Commission shall have all the jurisdiction and powers which are now, or may hereafter, by law, be vested in the Courts of County Commissioners of this State, or Board of Revenue, or any other governing body of like kind * * * .'

"2. Title 12, Section 177 of the Code of Alabama, 1940, provides that the Court of County Commissioners control all County property belonging to the County, and it further provides and directs the Probate Judge to make title thereto.

"By Section 7 of the Act creating the County Commission of Russell County, it seems to me that the Chairman of said Commission should execute all conveyances but the Attorney representing the Government insists that it is the duty of the Probate Judge to do so.

"Please render me, at your very earliest convenience, an official opinion showing the difference in the law, as applicable to this subject, in order that we may secure the appropriation for said Health Center as there is a time limit on same and we only have 8 days left."

In my opinion the provisions of Title 12, Section 177 of the 1940 Code of Alabama are applicable to and are controlling in the question presented by

your inquiry, and the Probate Judge of Russell County is the proper official to execute all conveyances of property of the county upon the order and direction of the County Commission. Said section provides as follows:

"§ 177. Commissioners have custody of property, and may sell.—The court of county commissioners have control of all property belonging the county, and may, by an order to be entered on its minutes, direct the disposal of any real property, which can be lawfully disposed of, and direct the probate judge to make titles thereto; and a conveyance made by the probate judge in accordance with such order invests the grantee with the title of the county."

The above quoted section directs the execution of conveyances of property of the county by the probate judge upon the authority or order of the County Commissioners, and the execution of such instruments of conveyance is an administrative duty imposed upon such judge in his official capacity and not as a member of the county governing body.

Section 7 of Act. No. 91, H. 296, approved October 14, 1932 (Local Acts Extra Session, 1932, page 35), provides as follows:

"Section 7. That the said County Commission shall have all of the jurisdiction and all powers which are now or may hereafter by law, be vested in the courts of county commissioners of this State, or board of revenue or other governing body of like kind, and the several members of the said County Commission of Russell County shall respectively perform all duties and services and render all the powers which are or may be required by law of the members of the courts of county commissioners, or boards of revenue or other governing bodies of like kind. That all general laws hereafter enacted by the Legislature of Alabama in relation to the jurisdiction, powers, authorities or duties of county commissioners in this State not in conflict with the provisions of this Act, shall apply to the said County Commission of Russell County, except so much of the said general laws as may relate to the mode of selection of said court of county commissioners, provided that this Act shall not be construed to impair the jurisdiction and authority of the said County Commission."

Said Section 7, *supra*, seeks to set out the power and authority of said County Commission and it may be well to note that said section contains no express provision for the execution of conveyances of property by the county, while said section does expressly provide that said County Commission shall have "all of the jurisdiction and all the powers which are now or may hereafter by law, be vested in the courts of county commissioners." It further provides "That all general laws hereafter enacted by the Legislature of Alabama, in relation to the jurisdiction, powers, authorities or duties of county commissioners in this State not in conflict with the provisions of this Act, shall apply to the said County Commission."

Section 8 of said Act, *supra*, defines the powers and duties of the Chairman of the County Commission as follows:

"Section 8. That the Chairman of the said County Commission shall sign all the minutes of the proceedings of the said Commissioners and

shall sign all warrants drawn upon the county treasury or repository all orders for payment or disbursement of the money or funds of the County. It shall be the duty of the said Chairman of such County Commission in said county to collect and receipt for all road tax and perform all other duties in connection therewith as are now required by law of other officials. It shall be the duty of the said Chairman of the said County Commission to receive and prepare the business and obtain information for the sessions of the said County Commission and to see to the execution of all orders of the said County Commission. The Chairman of the said County Commission shall issue all notices required to be given by the said County Commission and by law, and generally to do and perform all such duties and matters as may be required of him by the said County Commission."

While a careful examination of the provisions of said Section 8 discloses definite and explicit powers and duties of the Chairman, which are ordinarily confined to the judge of probate, it nowhere appears in said section that said Chairman shall have authority to execute conveyances by the county, nor, in any capacity, act for the judge of probate for such purpose.

It appears from a consideration of the entire Act, *supra*, that the intention of the legislature was to create a new county governing body to be known as the County Commission, in lieu of the Board of Roads and Revenue of Russell County, and, in so doing, to provide, among other things, for a Chairman of said Commission other than the probate judge of said county. Title 12, Section 177, *supra*, is a reenactment of Section 209 of the 1923 Code of Alabama, which section has been incorporated in the Codes of this State since 1852. The silence of the local act in failing to make any deviation or change in the provisions of said section is indicative of no intention to change.

Where it is sought, by local act, to reinvest powers, duties or authority granted by general law, the local act should be clear and unequivocal in its terms. *Pitts v. Culpepper et als*, 229 Ala. 449, 157 So. 841. The view expressed by our courts is that repeal by implication is not favored and nothing short of irreconcilable conflict between two statutes would do so. *Alford et al. v. Claiborne et al.*, 229 Ala. 401, 157 So. 226; *Fidelity and Deposit Company of Maryland v. Farmer's Hardware Company et al.*, 223 Ala. 477, 136 So. 824.

No conflict is apparent in this instant matter and it affirmatively appears that any construction, other than that expressed herein, would be superficial.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

October 5, 1942

Miss Loula Dunn, Commissioner,
State Department of Public Welfare,
Capitol.

Public Welfare — Administration — Expenditures —

State Department of Public Welfare authorized to act as agent of the Federal Government in a program calling for temporary emergency assistance, either in cash or in kind, to special groups of persons affected by enemy action.

Opinion by Assistant Attorney General Flowers.

Dear Madam:

Your letter of September 25, 1942, requesting my official opinion, is as follows:

"The Federal Government is calling upon the State Department of Public Welfare to join with it in administering certain war activities programs. In this connection it is necessary that we have your official opinion on the following matters:

"1. The right of the State Department of Public Welfare to contract with the Federal Social Security Board to act as the agency of the Federal Government within the State of Alabama to administer the emergency program providing temporary aid with respect to civilians in need as a result of enemy action. Under the contract the State Department would be required to obligate itself to administer a program calling for temporary emergency assistance either in cash or in kind to special groups of persons affected by enemy action. To the extent practicable other resources of the individual are to be taken into account in determining what assistance shall be given. The Department activities under the contract will take the following forms, roughly:

"(1) Grants for food, clothing, shelter, household equipment, medical care and transportation.

"(2) Operation of congregate shelter care.

"(3) Care of children in foster homes and institutions.

"(4) Replacement of tools and other working equipment.

"(5) Salvage, repair or replacement of furniture.

"(6) Minimum repairs to real property, for instance, covering a hole in the roof to make residence habitable.

"(7) Storage of household goods in exceptional cases.

"(8) Burial in certain cases.

"The proposals for financing the plan are as follows: The State agency will use its own funds in providing services and assistance required and will be reimbursed by the Social Security Board for expenditures made if proper financial and other records have been maintained. The contract contains the following provision also: 'Upon specific request from the designated agency, the Social Security Board may in its discretion advance funds in cases where such action is deemed necessary.'

"The Federal Government is likewise calling upon the State Department of Public Welfare to join with it in providing comparable services to certain persons who are in need of assistance as a result of restrictive governmental action, including services to citizens of unfriendly nations and their dependents. An arrangement has been made which guarantees similar protection to United States citizens residing in those foreign countries. This program is being initiated as a result of Presidential letters of February 6 and March 23, 1942, designating the Federal Security Agency to administer monies allocated from the President's Emergency Fund. The Federal Security Agency, in turn, has requested that this Department act as its agent in this matter. The plan will be financed in its entirety by the Federal Government. The proposed contract contains provisions identical with those of the civilian war assistance contract calling for expenditure of State funds and reimbursement thereafter, or advancement of funds where the discretionary authority of the Social Security Board so inclines. (Copies of proposed contracts with respect to civilian war assistance and enemy alien assistance are submitted herewith for your convenience.)

"The questions on which an opinion is desired are:

"1. Are the contracts proposed by the Social Security Board within the legal framework of the public welfare program in this State and in keeping with its established policies?

"2. In the event advanced grants-in-aid are not available, could any of the funds now appropriated to the Department of Public Welfare be utilized for this purpose with the understanding that Federal reimbursements would be made at a later date?

"3. Would the inauguration and administration of the enemy alien assistance and civilian assistance programs administered through the Department of Public Welfare necessitate Board action at both the State and county level?

"4. In the light of such factors as residence and citizenship being irrelevant from the standpoint of assistance to enemy aliens, would it be possible to advance money for such assistance from State appropriations which are governed by State acts requiring residence?

"5. Has the State Department of Public Welfare authority to receive Federal Funds and allocate them to county departments of public welfare for such purposes?

"II. The Federal Government is also requesting the State Department of Public Welfare to participate jointly with it in activities calculated to promote and coordinate the development of necessary programs for the day care of children, and in such connection to take such action as may be necessary or proper to assure the effectuation of such programs.

"The question on which an opinion is desired is:

"1. Has the State Department authority to engage in such work?

"There is also attached a copy of a resolution which was adopted by the State Board of Public Welfare at its regular annual session on September 25, 1942. The resolution, as you will observe, operates as an indication by the Board of its opinion that such matters fall within the war-time ambit of the term 'public welfare.'"

The State Department of Public Welfare is given a wide field of labor in "Welfare activities." In the Code of Alabama, 1940, Title 49, Section 8, it is stated that the "aim of the state department shall be the promotion of a unified development of **welfare activities** and agencies of the state and local governments so that each agency and each governmental institution shall function as an integral part of a general system." In order to carry out effectively the announced aims the law provides that it shall be the duty and responsibility of the state department, *inter alia* to "(1) Administer or supervise all forms of public assistance; * (5) Assist other * * * agencies * * * of the * * * federal government, when so requested, by performing services in **conformity with the purposes of the state department**" and to "(6) Act as the agent of the Federal Government in **welfare matters of mutual concern**, and in the administration of any federal funds granted to the state to aid in the furtherance of any of the **functions of the state department**, and be empowered to meet such federal standards as may be established for the administration of such funds."

In solving the problems presented in your letter of inquiry, it becomes important, therefore, to ascertain whether the services which the state department will be called upon to perform are actually "welfare activities" and whether they will be "in conformity with the purposes of the state department." In this connection it is noted that the state board of public welfare, (Code of Alabama 1940, Title 49, Section 3) in conference with the commissioner, is "responsible for the adoption of policies, rules and regulations for * * * the government of the state department" (Code of Alabama 1940, Title 49, Section 4.) The Supreme Court of Alabama in **Tuscaloosa County v. Walker**, 235 Ala. 293, 178 So. 543, has recognized that these experienced officials and their subordinates can "more nearly best determine for the general good than could others not so trained and experienced" and has indicated it to be its opinion that the Legislature intended for the policy-making body of the welfare department to exercise its judgment as to what in fact was embraced within the influence of the activities of the state welfare agency. The copy of the resolution which you submit concludes as follows:

"THEREFORE BE IT RESOLVED, that it is the sense of the Board

that in addition to those activities of a strictly peace time nature engaged in by the state Department of Public Welfare all programs directed to a successful prosecution of the war in which the assistance of the State Department of Public Welfare is requested by the Federal Government or any of its duly constituted agencies, as an agent thereof, including matters relating to the protection of the national security and the relief of civilian distress, are welfare matters of concern to the people of this State and shall be deemed in conformity with the purposes of the State Department of Public Welfare.

"BE IT FURTHER RESOLVED, that this resolution shall supersede all former expressions by this Board of policy relating to the scope and extent of the public welfare program in the State of Alabama and shall be liberally interpreted by the Commissioner to the end that the State Department of Public Welfare may act as agent of the Federal Government when requested in the administration of those programs designed to further the national war effort, PROVIDED, however, that the Commissioner of Public Welfare is hereby authorized and directed to limit the occasions upon which, and the extent to which the State Department of Public Welfare will participate as agent of the Federal Government in the administration of wartime public welfare programs in such manner as in her opinion will best insure the uninterrupted functioning of the State Department and the most effective utilization of the available resources thereof."

It is believed that this expression of Board policy, if adopted, will suffice to bring the matters covered thereby within the ambit of Subsections (5) and (6) of Section 8, supra, thereby affording authority for the state department to assist, or to act as the agent of the federal government or its agencies when requested. It is felt that the Board has not exceeded its authority by adopting a resolution such as that submitted. While the relief of civilians in need as the result of enemy action and the relief of the distress caused by restrictive governmental action necessary to protect the public welfare and the progress of the war effort is a primary responsibility of the federal government, it is obvious that such a program of relief can be administered most effectively through local state agencies already established. It was this factor which, no doubt, impelled the farsighted Legislature which first enacted the law creating the state department of public welfare to include therein a provision authorizing the state department to act as the agent of the federal government in welfare matters of mutual concern. As noted by the Supreme Court in the Tuscaloosa case, supra, the public interests were safeguarded by intrusting the determination of the factual question as to what was embraced within the term "welfare" to experienced officials. In the absence of a showing of an abuse of the discretion vested in them, their judgment and findings will not be overturned.

Upon the foregoing premises, it is my opinion that your inquiries relating to the authority of the state department to contract with the federal government or its agencies to act as an agent thereof in the administration of the so-called Civilian War Assistance Program and Enemy Alien Assistance Program may be specifically answered as follows:

1. The agreements proposed by the Social Security Board (both Civilian War and Enemy Alien Assistance) will be in keeping with the established

policies of the State department and within the legal framework establishing the welfare program.

2. In the event advance grants-in-aid are not available, only those funds appropriated to the state department by Section IX (1) of Act No. 247, S. 239, approved August 24, 1939, General Acts of 1939, page 415, for "1. Department of Public Welfare: For compensation of the Commissioner of Public Welfare, for other salaries, for other expenses, for juvenile wards, for public welfare, for old-age assistance, and for social security \$498,650," may be utilized for the purposes here in question. Other monies appropriated to the state department are specifically earmarked for designated purposes and may not be diverted therefrom. In view of this latter fact, it is suggested that every effort be made in the negotiations with the federal agencies to secure advance grants-in-aid.

3. In my opinion, the inauguration and administration of the civilian war assistance and enemy alien assistance programs would necessitate Board action at both the State and county levels. The necessity for State Board action has been heretofore discussed. County Board action is required, in my opinion, by the following provision of Code of Alabama 1940, Title 49, Section 12:

"All administrative and executive duties and responsibilities of the county department not inconsistent with the rules and regulations of the state board shall be performed by the county director, **subject to the approval of the county board.**" (Emphasis supplied)

Inasmuch as in the administration of both the civilian war and enemy alien assistance programs much of the work devolves upon the county directors, it would seem that approval of the county board is indicated.

4. Your fourth question has been answered in effect by the statement of my opinion in answer to your second inquiry. Since those state appropriations to the state department of public welfare which are governed by state acts requiring residence are earmarked for specific purposes and cannot, therefore, be used in advance of grants-in-aid, it follows that use thereof for these purposes is prohibited by such earmarking. While this relieves the necessity of answering your specific inquiry, it may be stated that it is believed that where state statutes require that funds be available only to persons meeting established residence requirements such funds may not be expended otherwise.

5. In my opinion, the state department of public welfare has authority to receive federal funds and to allocate them to county departments of public welfare for the purpose here under discussion. See Subsection (6) of Section 8, *supra*.

You next inquire whether the state department may join with the federal government in activities calculated to promote and coordinate the development of necessary programs for the day care of children, and in such connection take such action as may be necessary or appropriate to assure the effectuation of such program. The discussion with respect to participation by the state department in the civilian war and enemy alien assistance pro-

grams is applicable with equal effect to the instant question. Moreover, it appears that in addition to the other authority given the state department it is provided by subsection (12) of Section 8, supra, that it shall be the duty of the state department to —

“Seek out, through investigation, complaints from citizens, or otherwise, the minor children in the state who are in need of its care and protection and shall, as far as may be possible, through existing agencies, public or private, or through such other resources, aid such children to a fair opportunity in life.”

In my opinion, the foregoing subsection is sufficiently broad in its grant of authority, when coupled with the resolution of the Board and the other circumstances now prevailing and discussed above to afford authority for the action concerning which you inquire. If authority be desired for exacting a charge for services rendered in connection with day care activities, reference should be made to subsection (18) of Section 8, supra, which grants authority to solicit gifts and other things of value to be used in the support and carrying on of the work of the state department.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

October 7, 1942

Hon. G. D. Byars,
Sheriff, Lawrence County,
Moulton, Alabama.

Sheriffs — Costs — Fine & Forfeiture Fund —

When the fees of sheriffs in criminal cases may or may not be paid from the fine and forfeiture fund of a county in both the circuit and country court.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your letter of September 17, 1942, in which you request an official opinion, is as follows:

“(1) We have had considerable trouble in finding out just what claims are proper charges against the fine and forfeiture fund of this county. There has been a question about misdemeanor cases where there is no grand jury indictment. As you probably know about 95% or more of the cases in the county court of this county are tried on affidavit sworn

out before the Judge of Probate and Ex Officio Judge of the County Court. T. 11 S. 83 under B. mentions county courts and later mentions indictment, but in no case mentions affidavit. It is clear that it takes the same time and expense to arrest a person on affidavit as it would on an indictment. In view of these facts are we not entitled to these claims when disposed within the meaning of this section?

"(2) I find a note that says we are not entitled to a fee for serving a subpoena on a witness to appear before the grand jury where no indictment is found. I find nothing that says we are not entitled to arrest, bond, & guard fee, as you know we do not await the action of the grand jury to arrest a person who has committed a criminal offense. Are we not entitled to claim for these services against the fine and forfeiture fund?

"(3) It seems clear to me that we are entitled to a guard fee of \$2.00 in all cases where conviction follows arrest. Is that not true? Are we entitled to guard fee in misdemeanor cases where the state fails to convict, etc.?

"(4) We are entitled to a seizure fee and mileage for seizing contraband liquors. How is this cost taxed, and by whom is it paid? Is this a proper charge against the fine and forfeiture fund?

"(5) In T 11 S 83 it is plain that withdrawn and filed cases are proper charges against the fine and forfeiture fund. Is there any law contrary to this?

"(6) Under T 11 S 80 prisoners must first be proved insolvent by return of execution no property found before claims are proper charges. T 11 S 83 under E where a person is sentenced to hard labor for fine and cost or either execution cannot legally be issued in misdemeanor cases. Is that not true in a felony case? Can execution legally issue in cases where the State fails to convict or is nolle prossed, etc.? Then would that be a proper charge against the fine & forfeiture fund? This has been cited in Trapp vs. State but I have been unable to find that book."

My answer to your first inquiry is in the affirmative. I refer you to Title 11, Section 83, Sub-section (b), Code 1940, which is as follows:

"§83. Costs, how taxed and collected.—The fees specified in this article are to be collected and paid as follows: * * * (b) in all trials in the circuit court, or county court, or court of like jurisdiction—except justice of peace court and courts in lieu of justice of peace court whose jurisdiction in criminal cases is limited to the jurisdiction of justice of peace courts, where the state fails to convict, or the indictment abates or is nolle prossed or withdrawn and filed, the fees of the sheriffs and clerks of the court and the state's witnesses shall be paid out of the fine and forfeiture fund, but the sheriffs and clerks must make affidavit before the judge of the court in which the case is tried of the amount due them; * * *"

You will note this section starts off with "in all trials of the circuit court or county court or courts of like jurisdiction, etc." I realize, as you state, that ninety-five percent of the cases tried in the county court are tried on affidavit

and not indictment. See Title 13, Section 326, Code 1940, which is as follows:

"§326. Trials and proceedings in county courts; mode of appeal.—All trials or prosecutions instituted in all such county courts shall be begun upon affidavit and warrant as provided in this chapter and shall be tried by the judge of such court without a jury, and the judge shall determine both the law and the facts, and in cases of conviction the defendant shall have the right to appeal to the circuit court, and a jury trial may there be had on demand of the defendant as prescribed by law."

I also call attention to Title 13, Section 316, which is as follows:

"§316. Fees of clerks.—The fees and compensation of said clerks for their duties as clerks of the county court shall be the same as now allowed by law to the clerks of the circuit court in criminal cases, and shall be paid in like manner."

You will note that above section winds up with the following "and shall be paid in like manner." Therefore, if the fees can be paid from the fine and forfeiture fund in criminal cases in the circuit court under certain conditions, then I see no reason why they cannot be paid in the county court under the same conditions. But I see no need in pursuing this matter further, as it seems to me that the Supreme Court of Alabama settled this matter in the case of *Swendell, County Treasurer v. Crocker*, 217 Ala. 199, 115 So. 252. Of course, this case deals with the fees of clerks, but I cannot see why it would not apply to sheriffs with equal force.

In answer to your second inquiry, I am presuming you refer to cases sworn out before a magistrate for the purpose of a preliminary hearing. With this presumption in mind, my answer to your inquiry is in the negative. In all cases bound over to the grand jury in which the grand jury fails to indict, there is no provision of law whereby the sheriff can collect his fees accruing in the preliminary investigation. I call your attention to Title 11, Section 84, which is as follows:

"§84. Costs and fees in preliminary trials.—Whenever a defendant is convicted and sentenced to the penitentiary, or to hard labor, the costs of the committing magistrate and constable on preliminary trial, both together, not to exceed ten dollars, and the fees of the state's witnesses before the committing magistrate, not to exceed ten dollars, shall be taxed in the bill of costs in the same manner, and paid out of the same fund, at the same time and in the same way, as is provided by law for the payment of other items of costs incurred by the state; but the committing magistrate shall receive no pay unless he reduces to writing the evidence taken on the preliminary trial, as required by law."

It can be plainly seen from the above that no costs accruing on a preliminary trial can be taxed unless the defendant is convicted and sentenced to the penitentiary or to hard labor. See also Biennial Report of Attorney General, 1918-1920, page 523; Biennial Report of Attorney General, 1934-36, page 664; Quarterly Report of Attorney General, Volume XXII, page 207.

In answer to your third question, if you arrest a defendant and release him on bond, you would not be entitled to this fee in any instance. Title 11,

Section 100 of the Code of 1940, which has to do with fees of the sheriff, provides, in part, as follows:

"For guarding each prisoner lawfully committed to jail in the following cases:

In all felony cases whether convicted or not\$2.00

In all arrests under indictment whether convicted or not 2.00

In all other cases where convictions follow arrests 2.00"

In the latter instance, this simply means that if you arrest a defendant charged by affidavit for a misdemeanor and he is convicted, you are entitled to the \$2.00. If acquitted, nol. prossed, or abated by death, you are not.

In answer to your fourth question, I call your attention to Title 29, Section 129, Code 1940 (Section 4654, Code 1923), which is as follows:

"§129. Fees to be taxed for arrest and seizures in prohibition cases. —When an officer arrests any person in possession of an unlawful quantity or quantities of prohibited liquors, or of such liquors under conditions prohibited by law, then on the conviction of such party of a violation of a city ordinance or state law, whether in the recorder's court, or state court possessing jurisdiction, a fee for making the seizure of the liquors shall be taxed up against the defendant, and paid to such officer as a part of the cost of the case as follows: If a seizure is made of not less than one gallon, nor more than five gallons of such liquors, the fee shall be three dollars; if the seizure be of more than five gallons, and less than twenty gallons, the fee shall be five dollars; and if more than twenty gallons, be seized, the fee shall be ten dollars."

You can see from the above that if the seizure made is less than one gallon, no seizure fee can be charged. Quarterly Report of Attorney General, Vol. XXII, page 117. In cases where the sheriff is entitled to such fee on conviction of the defendant, it is a charge against him as a part of the costs. Quarterly Report of Attorney General, Vol. XXII, page 117, supra. The State will not pay the seizure fee even though the defendant is sentenced for fine and costs, for the reason that no provision is made for payment under Title 45, Section 69, Code 1940 (Section 3667, Code 1923), which section regulates and sets out what fees are payable by the State on conviction of a defendant. Quarterly Report of Attorney General, Vol. XXII, page 273, Biennial Report of Attorney General, 1920-1922, page 348. But such fees become a charge against the fine and forfeiture fund of the county under Code 1940, Title 15, Section 393 (Section 4039, Code 1923), where it says:

"* * * or in which defendants have been convicted, and have been proven insolvent by the return of execution 'no property found.'"

The section from which this is quoted is the section which regulates the payment of costs of witnesses and officials out of the fine and forfeiture fund.

Of course, all officers' costs are subordinate to and cannot be paid unless there is a surplus in the fund arising from fines and forfeitures in the county treasury, over and above the sum required to pay the claims of State witnesses. Quarterly Report of Attorney General, Volume XXII, page 273, supra. I think it well at this time to call your attention to the fact that Section 3740, Code 1923, has been amended and as amended it appears in the present Code as Title 11, Section 83, and the added portion to the section, or the amendment, is as follows:

"(e) If the defendant is convicted of a misdemeanor and sentenced to hard labor for fine and costs, or either, the fees for services under this article shall be paid by the state to the extent as now provided by law, and no execution shall issue against the defendant, and the sentence for fine and costs, or either, shall have the effect of a return of the execution 'no property found.' * * * "

In answer to your fifth inquiry, there has been no change in the statute. Code 1940, Title 15, Section 393, provides that in cases where the indictment has been withdrawn and filed, the fees of the officers of the court may be paid from the fine and forfeiture fund.

As to your sixth inquiry, it is true that Title 11, Section 80, Code 1940 (Section 3735, Code of 1923), provides:

"§80. When prisoner deemed insolvent; return of execution.—No prisoner shall be regarded as insolvent without the return of 'no property' upon execution issued against him, in the particular case; and no execution shall be so returned within less than thirty days from the time it goes into the hands of the sheriff."

Yet I do not think the above section is in conflict with the provisions of Title 11, Section 83, Code 1940. It is true that Title 11, Section 80, supra, provided that no person shall be regarded as insolvent without the return of execution "no property found" against him. Title 11, Section 83, supra, provided in subsection (e) as follows:

"(e) If the defendant is convicted of a misdemeanor and sentenced to hard labor for fine and costs, or either, the fees for services under this article shall be paid by the State to the extent as now provided by law, and no execution shall issue against the defendant, and the sentence for fine and costs, or either, shall have the effect of a return of the execution 'no property found,' and all such unpaid fees of the sheriff, clerks of court and state's witnesses shall be claims against the fine and forfeiture fund when evidenced as required by law;"

This is the same provision referred to in the above. This section appears for the first time in the Code of 1940. The above provision simply provides that when the above conditions prevail, this will be regarded and treated the same as an execution returned "no property found." The reason is apparent. If the defendant had been solvent and had property subject to execution, the sheriff could have collected the costs and fine out of him under execution, and there would have been no need for sentencing him to hard labor for same. I realize as stated above, that sub-section (e) of Title 11, Section 83, is new

and appears for the first time in the Code of 1940. Yet I see no conflict, and any fees of witnesses and officers not paid by the State become a legal charge against the fine and forfeiture fund of the county. I call attention again to Title 11, Section 83, Code 1940, where it says:

"And all such unpaid fees of sheriff, clerks of court and state witnesses shall be claims against the fine and forfeiture fund when evidenced as required by law."

The above is the latter part of sub-section (e) of Section 83, Title 11, which was quoted supra. I do not think the scope of sub-section (e), supra, can be broadened by interpretation so as to include felony cases, as the language is very clear. It starts off by saying:

"If the defendant is convicted of a misdemeanor and sentenced to hard labor for fine and costs or either." (Emphasis supplied)

Now as to the last part of your sixth question, which is:

"Can execution legally issue in cases where the State fails to convict or is nolle prossed, etc.? Then would that be a proper charge against the fine & forfeiture fund. This has been cited in Trapp vs. State but I have been unable to find that book."

Certainly no execution can issue under the conditions you enumerate, as there can be no judgment for costs against the State where the State failed to convict or a nol. pros. is had or where the case was abated by death, or the indictment is withdrawn and filed. But the claims of officers for their costs automatically become a charge against the fine and forfeiture fund of the county. See Title 15, Section 393, supra. This section deals, as I have stated above, with the fine and forfeiture fund. It provides for the costs of officers of the court arising from criminal cases in which the defendant is not convicted and the costs are not imposed on the prosecutor or in which defendants have been convicted and have been proven insolvent by the return of execution "no property found" or in cases in which the State enters a nol. pros. or withdraws and files the indictment or the prosecution is abated by the death of the defendant. In any event enumerated above, the costs of officers are automatically paid from the fine and forfeiture fund of the county.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General. .

October 12, 1942

Hon. J. P. Mitchell,
Judge of Probate,
Henry County,
Abbeville, Alabama.

Officers — Constitution, 1901, Section 280 — Commissioners Court
— Henry County.

1. Office of Deputy Solicitor or County Solicitor appointed pursuant to Title 13, Section 256 of Code of 1940, is "office of profit" within purview of Section 280 of Constitution, 1901.

2. Commissioners' Court of Henry County authorized to pay salary of deputy or county solicitor under provisions of Title 13, Section 257.

Opinion by Assistant Attorney General Lurie.

Dear Sir:

Your letter of October 3, 1942, in which you request an official opinion is as follows:

"The Mayor of Headland, in this County, has been appointed Deputy Solicitor (County Attorney) by the State Solicitor of the 20th Judicial Circuit. This position or office carries a salary of \$100 a month payable out of the General Funds of the County.

"After carefully reading Sec. 280, Constitution of 1901, it appears to me that the Headland Mayor has 'automatically vacated' the Mayor's office in accepting the office of County Attorney, since he can not 'hold two offices of profit at one and the same time.' This conclusion, however, contemplates that the office of deputy solicitor or county attorney is an 'office of profit.'

"Please advise me whether, in your opinion, the office of deputy solicitor or county attorney is an office of profit in the sense that the phrase is used in the Constitution. Further, if you hold that it is, please advise whether I am correct in assuming, in the event the new county attorney does not resign as Mayor, that the Commissioners Court would nevertheless be required by law to approve the claims of the county attorney of \$100 a month for his services. The salary of the Mayor of Headland is fixed by an ordinance at \$100 a month."

It has been determined insofar as this office is concerned that the office of deputy solicitor or county solicitor is an office of profit and that it comes within the purview of Section 280 of the Constitution of Alabama 1901. See opinion to Hon. George G. McDonald, Judge of Probate, Rockford, Alabama, Biennial Report of Attorney General, 1926-1928, page 105. Said Section 280 provides as follows:

"§280. No person holding an office of profit under the United States, except postmasters, whose annual salaries do not exceed two hundred dollars, shall during his continuance in such office hold any office of profit under this State; nor, unless otherwise provided in this constitution, shall any person hold two offices of profit at one and the same time under this State, except justices of the peace, constables, notaries public and commissioners of deeds."

There have been numerous cases in which the courts of this state have been called upon to determine whether a specific office was an "office of profit" under Section 280, *supra*. It appears from an examination of these cases that the rule applied therein relates back to that which the Supreme Court of this state adopted in the case of *Montgomery v. State ex rel, Enslen*, 107 Ala. 372, 18 So. 157, wherein the court said:

"There are three principal tests for determining whether one performing duties of a public nature is a public officer, in the sense of subjecting his incumbency or employment to a quo warranto proceeding: First, whether the sovereignty, either directly, through legislative enactment or executive appointment, or indirectly, as through a municipal charter, is the source of authority; second, whether the duties pertaining to the position are of a public character,— that is, due to the community in its political capacity; and, third, whether the tenure is fixed and permanent for a definite period fixed by law, unless for neglect of duty or malfeasance, or subject to termination at the will of others without the assignment of cause." (Emphasis supplied)

Title 13, Section 256, Code of Alabama, 1940, provides as follows:

"§256. Deputy solicitors appointed; removal.—The several circuit solicitors, except as otherwise provided by law, shall appoint a deputy solicitor in each county of his circuit, to represent the state in all cases in the county courts and inferior courts, and all preliminary proceedings, applications for bail and habeas corpus proceedings in all courts, aid or act for the circuit solicitor before the grand jury and in all matters in the circuit court when requested to do so by the circuit solicitor, and perform all the duties of the circuit solicitor in his absence when so directed by the circuit solicitor, and such deputies may be removed by the circuit solicitor at pleasure."

The application of the rule cited, *supra*, to said Section 256, *supra*, results in a finding that such office here under consideration exercises official powers invoked by legislative enactment in the performance of duties of a public character to the state and county, and the tenure is for a definite period, subject to termination at the will of the circuit solicitor and at his pleasure.

Title 13, Section 257, Code of Alabama, 1940, provides as follows:

"§257. Salary of deputy solicitor.—Unless otherwise provided by a local law, the deputy solicitor of the county shall be paid by the county an annual salary of twelve hundred dollars, on the warrant of the probate judge which salary shall be in lieu of all fees or compensations heretofore allowed by law to such deputy solicitor; provided, that in each county where a circuit or county court is held at more than one place in the

county, the deputy solicitor shall receive an annual salary of fifteen hundred dollars; provided further, that in Etowah County and Tuscaloosa County the deputy solicitor shall be paid by the county an annual salary of eighteen hundred dollars."

Thus it is noted that, by general law, the office of deputy solicitor receives compensation which tends to further show that it is an office of profit. The salary of \$100 per month shall be paid for the services of such officer, in accordance with the provisions of Section 257, supra, and the answer to your second inquiry must, therefore, be in the affirmative. Whether or not the deputy solicitor seeks to retain his official capacity and salary as Mayor of Headland, Alabama, is of no financial moment to the Commissioners' Court of Henry County.

You have presented no inquiry as to whether the office of Mayor of Headland has been vacated by the acceptance of the office of deputy solicitor. Therefore, I refrain from a discussion of the legal principles contained therein.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

October 13, 1942

Hon. J. E. Kennedy,
Sheriff, Dallas County,
Selma, Alabama.

Sheriffs — Fees — Serving Notices — Probating Wills —

Sheriffs are entitled to \$1.50 for serving notices on next of kin or heirs of a decedent of the time and place of probating a will.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your letter of August 18, 1942, in which you request an official opinion, is as follows:

"I am enclosing letters from Mr. Singleton and Judge Blanton about fees to be paid the sheriff and I would like for you to give us an opinion.

"I feel like a citation is worth \$1.50 now if I have to serve subpoenas are only worth 65c."

Your request for opinion concerns certain notices to be served by the

sheriff in matters which are heard before the probate court. In answer to your inquiry, I presume the matter you have in mind is the probating of a will and the notice you refer to is one which the sheriff serves on the next of kin or heirs of the decedent. I reach this conclusion from the fact that you, as well as Mr. Singleton in his letter to Judge Blanton, cite the opinion of this office rendered on July 6, 1927, to Hon. A. L. Hasty, Judge of Probate, Marengo County, which opinion deals with this precise question. (Biennial Report of Attorney General, 1926-28, page 213.)

With this presumption in mind, I call your attention to an opinion of this office rendered to Hon. J. Lee Smith, Judge of Probate, Chilton County, (Quarterly Report of Attorney General, Volume XXVI, page 22). In this opinion, this office holds that the sheriff is entitled to a fee of \$1.50 for serving notices on next of kin or heirs of the decedent of the time and place of hearing the application for probating of will. This opinion holds this without referring to the opinion of this office of July 6, 1927, *supra*, which holds a contrary view from the opinion to Judge Smith and should have been referred to and overruled at that time. I am now overruling and holding for naught said opinion, and I am reaffirming the holding of the opinion to Hon. J. Lee Smith, Judge of Probate, Chilton County, *supra*, which opinion sets the sheriff's fee at \$1.50 for this service.

I notice in Judge Blanton's letter of August 5, 1942, to the Chief Examiner of Accounts, he refers to what he calls a new docket and a fee book prepared by the Chief Examiner of Accounts and a committee of probate judges, which pertains to the fees of sheriffs of the various counties. I have not seen a copy of this new docket or fee book, but let it be as it may, it is not binding and cannot be followed when and where it conflicts with the fees set out by the Code. Fees set out in the Code must prevail against any and all fees shown by any other schedule of fees, no matter from what source it may emanate and regardless of the good intention of those preparing the same. I would suggest that you examine the other opinions of this office cited in the opinion to Judge Smith, *supra*. They will no doubt throw light on the kindred services made by the sheriff; especially will you find this true of the opinion cited in Quarterly Report of Attorney General, Volume XVI, page 9.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

October 14, 1942

Hon. I. C. Heck,
State Comptroller,
Capitol.

Certificates of Purchase of real estate bid in for the State at tax sales — Use of rubber stamp facsimile signature thereon.

Opinion by Assistant Attorney General Lapsley.

Dear Sir:

In your letter of October 14, 1942, you request my opinion as follows:

"Your official opinion is requested as to whether the Comptroller is authorized to approve and accept certificates of purchase of real estate bid in for the State at tax sales, when such certificates are signed by the Judge of Probate by the use of a rubber stamp facsimile signature."

The certificates of purchase of real estate bid in for the State at tax sales, issued pursuant to Title 51, Section 267, Code of Alabama, 1940, required to be issued by the judge of probate to the State become the evidence of the title thus acquired by the State. The statutes make no provision for the issuance of any deed to the state in lieu of the certificate, as in the case of other purchasers at tax sales.

In the case of **Downing v. City of Russellville**, 3 So. (2d) 34, 241 Ala. 494 (1941), the court held:

"The effect of the purchase by the state, unless otherwise provided withdraws the property from further taxation, until redeemed or sold by the state, Gen. Acts 1935, p. 357, Section 232, Code 1940, Title 51, Section 267; and the state is entitled to the possession of the lands immediately upon delivery of the certificate of purchase, by the Judge of Probate, and may recover the same in an action of ejectment. Gen. Acts 1935, p. 363, Section 251, as amended, Code 1940, Tit. 51, Section 286.

"In short, title to the property vests in the state in virtue of the purchase, without the necessity of executing a deed, while other purchasers do not acquire title until after the expiration of the redemption period, three years, and the execution of a deed by the Judge of Probate upon surrender of the certificate of purchase."

In view of the fact that the certificate of purchase issued to the State for lands bid in for the State at tax sale is the instrument under which the State may make demand for possession of the lands, and evidences the vesting of title, it is my opinion that such certificates of purchase should be signed by the judge of probate under his genuine signature.

While there is authority to the effect that rubber stamp facsimile signatures may be used by an officer and adopted by him as his signature, in some cases it may become necessary to prove that the signature was thus duly authorized

or ratified and adopted as and for his own signature. Such burden of proof may be avoided by requiring the genuine signature to the certificate here under consideration.

It is, therefore, my opinion that in examining such certificates of purchase submitted to you under the provisions of the above-mentioned statute, you should require the same to bear the original signature of the judge of probate issuing the same.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

October 15, 1942.

Hon. B. G. Farmer, Sheriff,
Houston County,
Dothan, Alabama.

Fees — Insolvent Costs — Court of Common Pleas of Dothan,
Alabama.

1. Under Local Act No. 410, H. 992, approved September 27, 1923, Local Acts of Alabama, 1923, page 288, as amended by Act No. 160, S. 159, approved March 15, 1939, Local Acts of Alabama, 1939, page 86, creating the Court of Common Pleas of Dothan, Alabama, sheriff held not entitled to collect fees from the "Inferior Court Fund" of said Court.

Opinion by Assistant Attorney General Flowers.

Dear Sir:

Your letter of September 18, 1942, requesting my official opinion, is as follows:

"Under Section 11 of the Act creating the Court of Common Pleas of Dothan, Alabama, (Local Acts 1923, page 288) it is provided that all process issued out of said court shall be directed to any lawful officer of the state of Alabama and shall be executed by the Sheriff of Houston County, Alabama, or his deputy, where execution may be had in said county, and in all other cases shall be executed in the same manner and by the same officers as though it had been issued by a justice of the peace. It is also provided that for services rendered in the execution of the process of said court, the officer executing shall receive the same compensation (as if) issued by justices of the peace and served by sheriffs, the same to be taxed and collected as taxed and collected in the courts of justices of the peace.

"Title 13, Section 418, Code 1940, provides that it is the duty of every justice of the peace and notary public exercising the jurisdiction of justices of the peace to collect all fines imposed where the defendant is not sentenced to jail or hard labor to pay same or an appeal is taken. Also that he may deduct from fines and forfeitures collected by him the amount due for his fees and those of the constable in cases in which the defendant was acquitted or insolvent and unable to pay after conviction a sum of not to exceed fifty dollars for any calendar month.

"I would like to know whether the Clerk of the Court of Common Pleas of Dothan, Alabama (Local Acts 1931, page 194; Local Acts, 1939, page 86) has authority to pay to me, as Sheriff of Houston County, Alabama, from the fines and forfeitures collected by him my fees in cases in which the defendants were acquitted or insolvent and unable to pay after conviction a sum not exceeding fifty dollars for any calendar month.

"Your opinion on this question will be very much appreciated."

I am of the opinion that the Clerk of the Court of Common Pleas of Dothan, Alabama, has no authority to pay the Sheriff of Houston County, Alabama, from the fines and forfeitures collected by him, the sheriff's fees in cases in which the defendants were acquitted or insolvent and unable to pay after conviction.

Title 11, Section 79, Code of Alabama, 1940, provides as follows:

"§79. The law of costs must be deemed and held a penal law, and no fee must be taken but in cases expressly provided by law. The fees prescribed in this code shall be the only fees that can be collected by any officer."

Statutes on the subject of fees and costs are penal and they must be strictly construed. *Lee v. Smyley*, 16 Ala. 773; *Dent v State*, 42 Ala. 514; *Greene County v. Hale County*, 61 Ala. 72; *Troup v. Morgan County*, 109 Ala. 162, 192 So. 503. So, unless we can point to some specific authority for the payment of the sheriff's fees from the fines and forfeitures collected, such fees may not legally be paid.

Reference is made to the local act, creating the Court of Common Pleas of Dothan, Alabama, in lieu of justices of the peace. Act. No. 410, H. 992, approved September 27, 1923, Local Acts of Alabama, 1923, page 288, provides in part as follows:

"Section X. The Judge of said court shall tax in each case in said court as court cost the same fees allowed justices of the peace in similar cases, which cost as well as all fines, forfeitures and penalties assessed or imposed in said court shall be paid in lawful money and on the first day of each month the judge of said court shall file with the judge of probate his report giving a full statement of all cost, fines, forfeitures and penalties collected since his last report and the style of the case in which the same were collected and the said funds so reported shall be paid by the judge of said court to the depository of the county and such depository shall place said funds in a special fund to be known as 'The Inferior Court Fund' and shall pay no money out of such fund except on warrants drawn by the Probate Judge of Houston County, on such special fund.

That the Judge of Probate of Houston County is hereby authorized and it is made his duty to draw his warrant against said Inferior Court fund for the compensation of the judge of said Inferior Court and for the necessary expenses of said court for dockets and other stationery that may be bought by the judge of the said court, and immediately after the first of January of each year he will draw his warrant against said fund for the excess thereof remaining on deposit after all demands against the same have been paid for the previous year, and be transferred to the fine and forfeiture fund of Houston County, Alabama.

"Section XI. All process issued out of said court shall be directed to any lawful officer of the State of Alabama, and shall be executed by the sheriff of Houston County, Alabama, or his deputy, where execution may be had in said county, and in all other cases shall be executed in the same manner and by the same officers as though it had been issued by a justice of the peace. For services rendered in the execution of the process of said court the officer executing shall receive the same compensation issued by justices of the peace and served by sheriffs, the same to be taxed and collected as taxed and collected in courts of the justices of the peace. Witnesses in said court shall be entitled to the same fees as in justice court to be taxed and collected as in said justice court."

Act No. 160, S. 159, approved March 15, 1939 (Local Acts of Alabama, 1939, page 86) provides, in part, as follows:

"Section 2. That there is hereby created and established the office of Clerk of the Court of Common Pleas of Dothan, Alabama."

"Section 5. It shall be the duty of said ex-officio Clerk to keep the dockets, cash book and such other records as are, or may be, required to be kept by said Court of Common Pleas of Dothan, Alabama, and to purchase all dockets, stationery and supplies as may be necessary, the same to be paid for as is now provided by law, and to take affidavits and acknowledgments in all cases in which the authority to administer such oath or take such affidavit is not confined to some other officer, and to attend the session of this court and to collect all costs and fees in said Court, pay them to the proper persons to whom they belong, and make a report on the first of each month, with a statement of all costs, fines and fees, collected during the preceding month, and their distribution, and he shall have power to issue summons, writs, executions, approve bonds in civil cases, and issue all other civil process of which said Court has jurisdiction to try."

Thus it appears that insofar as this court is concerned the "fine and forfeiture fund" as well as the "insolvent cost fund" is nonexistent. It is provided that all fines and forfeitures collected must be paid on the first day of each month, by the clerk of said court, into the county depository where said funds shall be placed in a special fund known as "The Inferior Court Fund." It is further provided that no money shall be paid from such fund except on warrants drawn by the Probate Judge of Houston County. The clerk of this court is under no circumstances authorized to draw upon said fund. The Judge of Probate of Houston County is authorized to draw his warrant against said fund for specified purposes, to wit: "Compensation of the judge of said Inferior Court and for the necessary expenses of said court for dockets and

other stationery that may be bought by the judge of said court." Attention is also called to the fact that the judge of probate is directed to draw his warrant against said fund immediately after the first of January of each year for the amount remaining on deposit after all demands against the same have been paid for the previous year, and transfer said funds to the fine and forfeiture fund of Houston County, Alabama.

In view of the specific limitations placed upon the purposes for which warrants may be drawn against the "Inferior Court Fund," I am of the opinion that the sheriff may not be paid his fees from said fund in cases in which the defendants were acquitted or insolvent and unable to pay after conviction.

Insofar as an opinion rendered by this office under date of March 25, 1925, to the Honorable T. E. Buntin, Judge of the Court of Common Pleas, Dothan, Alabama, is in conflict with the instant opinion, the same is hereby expressly overruled.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

October 16, 1942

Hon. E. B. Norton,
State Superintendent of Education,
Capitol.

Code 1940, Tit. 52, §164 — City Board of Education — Director of
Counselling and Placement —

Upon recommendation of the City Superintendent of Schools a city board of education is authorized to employ as a professional assistant to such superintendent an officer to be known as Director of Counselling and Placement for the purpose of advising and assisting public school pupils in and about opportunities for work and employment and their further education and training.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your request of October 1, 1942, which is as follows:

"On September 18, 1942, the Birmingham City Board of Education passed resolutions to the following effect:

"1. Dr. C. B. Glenn, retiring City Superintendent of Education, was

appointed Superintendent Emeritus for the period September 1, 1942, to October 1, 1943, without pay.

"2. Upon the written recommendation and nomination of Superintendent L. Frazier Banks, Dr. C. B. Glenn was appointed Director of Counselling and Placement at a salary of \$250 per month, beginning September 1, 1942, with the following duties assigned to him, together with such others as to the Superintendent may seem desirable:

"1. Have a central office and talk and advise with pupils about opportunities for work.

"1. Talk and advise with pupils and parents about courses pupils should take leading to certain types of work.

"3. Keep in touch with opportunities for work in community.

"4. Organize information to go to pupils and parents. Some of this will be done by talking direct with pupils. Much of it will be done through coordinating the work of Advisors to Boys, Advisors to Girls, and upper grade teachers along this line.

"5. Help graduates and others make good contacts looking to continued education or employment.

"6. Assist pupils in the choice of careers by arranging for talks and conferences between them and men who have had successful experience in this field of work. These conferences may be held in the schools or the pupils be permitted to visit designated men at their places of business."

"Superintendent L. Frazier Banks of the Birmingham City Schools has requested me to secure an opinion from your office concerning the authority of the Birmingham City Board of Education to appoint Dr. C. B. Glenn as Superintendent Emeritus without pay and as Director of Counselling and Placement at a salary of \$250 per month.

"Therefore, I shall appreciate it very much if you will answer these two questions at your earliest convenience."

In a letter dated October 7, 1942, you further advise as follows:

"Boards of education of city school systems throughout the United States customarily employ persons to serve in this capacity. Boards of education use various titles for this class of position, such as director of guidance, supervisor of guidance, director of placement, supervisor of placement, etc. School authorities generally recognize that it is an educational responsibility to provide students with necessary educational and vocational guidance services."

Code 1940, Title 52, Section 164, reads as follows:

"§164. Assistants to city superintendent of schools.— The city board of education shall, upon the recommendation of the city superintendent of schools, employ such professional, clerical, accounting and statistical assistants as, in the judgment of the board, are necessary."

I understand, therefore, from your letter of October 7, from which I have quoted above, that the duties assigned to the office of Director of Counselling and Placement, created by resolution of the city board of Education of the City of Birmingham at a meeting held September 18, 1942, are considered as an essential part of the public school system in large cities throughout the United States. On that hypothesis it is competent, in my opinion, for a city board of education to create such an office and, upon recommendation of the city superintendent of schools, to employ such an officer as a professional assistant to the city superintendent and to fix his compensation.

In my opinion, therefore, the Birmingham City Board of Education was authorized to appoint Dr. C. B. Glenn, Director of Counselling and Placement at a salary of \$250 per month.

I am unable, however, to find any authority whereby the City Board of Education was authorized also to appoint Dr. Glenn as Superintendent Emeritus, and I am of opinion, therefore, that such appointment was unauthorized.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

October 16, 1942.

Hon. G. H. Boyd,
Register, Circuit Court, in Equity,
Jefferson County,
Birmingham, Alabama.

SOCIETIES FOR PUBLIC IMPROVEMENTS —

1. Title 10, Section 150 of the Code of 1940 contemplates that the society therein mentioned shall call a meeting and adopt a constitution and by-laws for the corporation and that this constitution, so adopted, shall state the amount of personal liability assumed by each of the individual members of the society.

2. Under this section the incorporators cannot by the constitution adopted exempt themselves personally from all liability.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for official opinion, bearing date of Oct. 14, 1942, is as follows:

"Section 150, Title 10, Code of Alabama 1940 has come before me for certain interpretations. I would like to have your opinion stating the meaning of the question of limited liability or individual liability as used in said section.

"It is the general rule, as you know, that individual members of corporations are not liable for the debts and defaults of the corporation as such. This particular section, however, is written unusual in its phraseology and may be subject to more than one interpretation. The interpretation of the Attorney General's office, with reference to individual liability or limited liabilities of the individual members as set up in said section would be appreciated. Specifically:

"1. May a corporation organized under the section expressly exempt its members from any personal liabilities for acts or omissions of the corporation?

"2. Would it be legal to state in the corporation papers that each individual member would be limited to a nominal sum,—say one dollar?"

I have examined the section and title of the code referred to in your request for an opinion of this office. This section has never been construed by our appellate courts. The section referred to provides that a verified copy of the constitution and by-laws of the proposed corporation and the name and object or purpose of the organization and the measure of personal liability for its obligations to be assumed by the individual members shall be filed for record in the office of the judge of probate of the county in which such society is located.

In my opinion, the named section contemplates that there shall be a meeting of the members of the proposed incorporation and that a record of the proceedings of the meeting shall be made showing the adoption of the constitution and by-laws of the company and the constitution and by-laws shall state the amount of liability assumed by each member thereof. It follows that some amount of liability assumed by each member must be fixed in the constitution and that the amount so stated in the constitution fixes the liability of each member. Any amount satisfies the requirement of the statute.

From the foregoing, it is shown that there cannot be an exemption of personal liability of the members of the corporation but that any sum of money fixed in the constitution and by-laws is sufficient.

The foregoing opinion is not intended to express any opinion on the question of liability of the corporation.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

October 20, 1942

Hon. J. W. Hamilton,
Tax Collector,
Jefferson County,
Birmingham, Alabama.

Taxation — Ad Valorem — Appeals — Assessment to be paid.

Taxpayer who takes two or more successive appeals from annual assessments, as a condition to maintaining his appeal, where no supersedeas bond is given, must pay taxes based on the assessment for the year next preceding the assessment from which the first appeal is taken.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Your request for official opinion bearing date of September 31, 1942, is as follows:

"For the tax year of 1940 Joe Doe assessed a piece of real estate for \$10,000. For the tax year of 1941 the Board of Equalization raised the value on said real estate to \$12,000. Joe Doe appealed to the Circuit Court for an adjudication of the value, and paid tax on the preceding year's value of \$10,000. This case is still pending in the Circuit Court and the value of said property was fixed for the tax year of 1942, at \$12,000 and an appeal was also taken to the Circuit Court on this value for the 1942 tax year.

"Shall I collect tax for the tax year of 1942 on the \$10,000 value or the \$12,000 value. Section 110, Title 51, Page 79 of the new Code reads, in part, as follows:

" 'When an appeal is taken the taxpayer shall pay tax due as fixed for assessment for the preceding tax year, *** ' "

"In your opinion, is 'value fixed for assessment' for the tax year of 1941 \$10,000 or the litigated value of \$12,000?"

It seems to have been the intent of the legislature, over a period of several years, to require the taxpayer to pay taxes on the assessment, from which an appeal is taken, on the basis of a valuation fixed for the tax year preceding the tax year of the assessment from which the appeal is taken.

I find a provision in Section 108, Acts of 1919, p. 317, as follows:

" * * * ; provided, however, that no such appeal shall suspend the right of the State and County to collect from the taxpayer the taxes due upon his property at the valuation theretofore fixed for assessment for the preceding tax year, and the taxpayer shall, when the taxes are due, pay all taxes due at the assessed valuation for such preceding year."

I find also in Section 61, Act of 1923, p. 183, a provision of similar import in words as follows:

" * * * ; provided, however, that no appeal shall suspend the right of the State and Counties to collect from the taxpayer the taxes due upon his property as fixed for assessment for the preceding tax year, and the taxpayer shall, when the taxes are due, pay all taxes due at the assessed value of the preceding year."

The legislature in 1935 incorporated in the Revenue Act, Acts of 1935, p. 256, Section 78, (p. 294) a provision as follows:

"Where an appeal is taken the taxpayer shall pay the taxes due as fixed for assessment for the preceding tax year before the same becomes delinquent, and upon failure to do so, the court upon motion ex mero motu must dismiss the appeal, unless at the time of taking the appeal the taxpayer has executed a supersedeas bond with sufficient sureties to be approved by the Clerk of the Circuit Court in double the amount of taxes, payable to the State of Alabama, conditioned to pay all taxes, interest and costs due the State, County or any agency or subdivision thereof."

The same provision is found in Section 110, Title 51, Code of 1940.

A provision dealing with assessments made by the State Tax Commission, and certified to the Tax Assessor, from which an appeal is taken, is found in Section 73, Acts of 1923, p. 185, from which is quoted as follows:

" * * * ; provided, however, that no appeal shall suspend the right of the State and counties to collect from the taxpayer the taxes due upon his property as fixed for assessment for the preceding year."

Justice Foster writing the majority opinion for the Supreme Court of Alabama, in the case of *State vs. Mobile & O. R. Co.*, 154 So. page 91, observed:

"When an appeal is taken under section 73 of the act of 1927, an assessment is due to be certified on the basis of the valuation of the preceding year, and not on the basis of the assessment from which the appeal was taken.

"But an appeal seems to be pending from that assessment also. Presumably during a hearing of that appeal taxes were assessed and paid tentatively on the valuation of the year preceding that. So that pending the present appeal it is suggested that the proper course, in order to pursue the literal requirements of section 73 of the act 1927, would probably be to assess and pay on the same valuation as was applicable pending appeal from the former assessment. The petition for injunction is probably inaccurate in its averment that pending the present appeal, it is the purpose of the state tax commission to certify the valuation as made in the order from which this appeal was taken. That is our interpretation of its averments."

1

In view of the above quoted observation, which is pertinent to Section 110, Title 51, Code of 1940, it is my opinion that the taxpayer should pay and you should collect taxes for 1942 based on the assessment for the tax year 1940, that is to say, \$10,000.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

October 21, 1942.

Hon. O. L. Andrews,
Clerk of the Circuit Court,
Birmingham, Alabama.

Code 1940, Tit. 7, §§506, 574, 582-3, 584-5 —

Executions — Scire Facias — Revivor —

Execution, without revivor of judgment, may issue at any time within twenty years next after rendition of judgment, provided execution has previously been issued on said judgment within ten years next after rendition thereof, and provided also not more than ten years have elapsed since the last preceding execution was issued, and provided also no execution, with or without revivor by scire facias, may be issued after twenty years from date of rendition of the judgment.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your request of October 1, 1942, which is as follows:

"Under Section 7862 of the 'Code of 1928', it had always been our practice in this office, in all cases, to require that the judgment be revived after the lapse of ten years from the date of its rendition before an alias execution could issue.

"This section has been left out of the new Code and now there is a difference of opinion here as to whether an execution can issue after ten years from the date of the judgment or whether it should be revived at all.

"Please give me your opinion on the following phases of this question:

"First: Judgment rendered January 1, 1932 and execution issued within thirty days. Can another execution issue January 5, 1942 without a revival?

"Second: Judgment rendered January 1, 1932 and several executions issued, the last one November 1, 1941. Will the judgment die January 2, 1942, or does the fact that the last execution issued keep it alive for ten years from November 1, 1941.

"Third: What effect, if any, on these two questions does the fact that the certificate of judgment has been issued, filed and recorded in the office of the Probate Judge at any time within the ten-year period?

"References: Section 7862, 7863 and 7873 of the 'Code of 1928,' Title 7, paragraph 574, 580 of the 1940 Code."

Answer to your question involves construction, in *pari materia*, of statutory provisions of law relating to the issue of executions and to be found in Code 1940, Tit. 7, §§506, 574, 582, 583, 584-5.

Under Section 506 execution may issue at any time within ten years after the judgment was rendered, whether the judgment has been registered or not. Under the Code of 1923, if the judgment was not registered, execution could be issued within one year after rendition of judgment, and thereafter "at any time within ten years after the rendition of the judgment, without a revival of the judgment." Code 1923, §§7793, 7862.

With reference to said Section 7862, it was observed in **Second National Bank v. Allgood**, 234 Ala. 654, on page 656, 176 So. 363 (1937) that "Section 7862, *ex vi termini*, contemplates a revivor after ten years, although executions have been regularly issued during that period."

Code 1940, Tit. 7, §574, taken without change from Code 1923, §7863, forbids issue of execution after ten years from rendition of judgment, "until the same has been revived by *scire facias*," if execution has not been issued within the ten-year period.

Code 1940, Tit. 7, §582 (Code 1923, §7871) creates a *prima facie* presumption that the judgment has been satisfied (a) "if ten years have elapsed from the rendition of the judgment * * * without issue of execution," or (b) "if ten years have elapsed since the date of the last execution issued."

The presumption is not conclusive; it merely casts upon the judgment creditor the burden of showing by *scire facias* that the judgment has not been satisfied. **Hays v. McCarty**, 239 Ala. 400, 195 So. 241; **Fleming v. Fowlkes & Co.**, 204 Ala. 284, 85 So. 690.

As said in **Second Nat. Bank v. Allgood**, *supra*, on page 656:

"The object of the proceeding * * * is to enable the judgment creditor to enforce by execution the judgment he has already obtained. * * * The order to revive does no more than reinvest the plaintiff with the right

to have execution of his original judgment. * * * The order merely confers upon the plaintiff the **statutory right** to issue executions on the judgment after it has become dormant for that purpose."

In my opinion omission of Section 7862, Code 1923, from the Code of 1940, taken in connection with the dictum in **Second Nat. Bank v. Allgood**, supra, that the effect of said section was to necessitate "revivor after ten years, although executions have been regularly issued during that period," affords basis to conclude that revivor by scire facias is now required under the Code of 1940 only in case (a) execution has not issued within ten years after judgment rendered, or (b) execution has not issued within ten years from date of the last execution, in cases where execution or executions issued within ten years after judgment rendered.

This ties in and harmonizes with the statutory presumption of satisfaction declared by Code 1940, Tit. 7, §582 and created by lapse of ten years (a) either after "rendition of judgment without issue of execution," or (b) after "the date of the last execution issued."

Obviously the office or function of scire facias is to afford the judgment creditor opportunity to rebut the statutory presumption of satisfaction. In cases where the presumption does not arise there is no legitimate occasion for its exercise.

I am of the opinion therefore that if execution has issued at any time within ten years after rendition of judgment additional executions may issue without revivor at any time within ten years next after the last execution issued; provided, however, that after lapse of twenty years from rendition of judgment, a conclusive legal presumption of satisfaction arises, and execution may no longer issue, with or without revivor. Code 1940, Tit. 7, §§19, 583. **Second Nat. Bank v. Allgood** supra, **Marx v. Sanders**, 98 Ala. 500, 11 So. 764.

In your first question you do not state exactly when execution issued. I am unable to answer the question except to say that if execution issued within ten years next preceding January 5, 1942, another execution might issue on that day, without revivor.

For answer to your second question, I am of opinion that inasmuch as execution issued after November 1, 1941, and within ten years after rendition of judgment, another execution may issue within ten years next after November 1, 1941, without revivor of the judgment by scire facias.

For answer to your third question, the two foregoing questions are not affected by the fact that a certificate of the judgment has been "issued, filed and recorded in the office of the Probate Judge at any time within the ten-year period." Under the Code of 1940, Tit. 7, §§584, 585, the only effect of registration is to create a lien on the judgment debtor's property subject to execution, in the county where filed, "for ten years, after the date of such judgment."

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

October 29, 1942.

Hon. J. C. Griffin,
Sheriff, Perry County
Marion, Alabama.

Sheriff — Removal — Allowance —

Sheriff entitled to only one per diem and necessary traveling expenses for one trip when two or more prisoners are removed on such trip.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your request for official opinion, bearing date of October 13, 1942, is as follows:

"I attach a copy of letter I had from I. C. Heck, State Comptroller.

"I had warrants for J. B. Locke and Manual Whorton, and duly presented proof of the removal with the account to the Circuit Clerk of Perry County, Alabama.

"Manual Whorton plead guilty and J. B. Locke was tried and a jury in verdict of guilty returned.

"You will notice that in the letter from Mr. Heck, he says as follows:

"It is noted that both these defendants were removed from the same County on the same date, and were charged with the same offense. The State, therefore, can pay only one bill as these defendants should have been removed on one and the same trip."

"It has always been the custom that the Sheriff be allowed the removal fee on each prisoner. Therefore, this is to respectfully request that you give me your Department's ruling whether I am entitled to removal fee, one from J. B. Locke, and another from Manual Whorton."

In your request you fail to state whether the offense charged for which the prisoners were removed was a misdemeanor or felony. This is of importance for the reason that, if it was a misdemeanor the county must pay for the removal. On the other hand, if it was a felony the State pays. In this connection, I call your attention to Title 11, Section 100, Code 1940, which has to do with the fees and allowances of sheriffs. You will note this section says, in part:

"* * * to be paid by the State in case of felonies, and by the County when the offense committed is a misdemeanor. * * *"

You will note this section provides also as follows:

"For removing any prisoner upon a charge of venue granted in his case, or who is arrested on a warrant issued by a justice of the peace, or on an indictment, and confined in a county other than that in which he is triable or arrested for contempt, or as a defaulting witness, three dollars for himself or his deputy acting in his stead, and two dollars for each guard for each day they are respectfully engaged in such removal, together with the actual necessary traveling expenses of himself or deputy, and guard or guards, and prisoner or prisoners, while on the trip, by the nearest route usually traveled between the points from and to which such removal is made."

Note the words in the above quotation "necessary traveling expenses."
(Emphasis supplied)

If you had two prisoners confined in jail of another county in Alabama whether the charge be a felony or misdemeanor and you returned both of such prisoners to the jail of your county on one and the same trip, if this was by train, then you would be entitled to be repaid for each of their railroad fares but if, on the other hand, you removed them by automobile at one and the same time you could charge only actual necessary expenses of your automobile for one trip and not for two. In fact, there could be only one trip, no matter what the number of prisoners might be. Of course, if you furnish meals for the prisoners, you would be entitled to pay for each meal you furnished them individually.

Under the facts you detail in your request, you could charge per diem for only one day as this is all the time that was required to make the trip and the fact that you are transferring two prisoners or more on the same day would make no difference. Certainly, you could not charge a per diem for transferring each prisoner as this fee is intended to cover one day's service and, as stated above, the number of prisoners does not affect it one way or the other.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

October 29, 1942.

Hon. W. G. Pruett,
State Highway Director,
Highway Department,
Montgomery, Ala.

Code 1940, Tit. 23, §§ 16, 48,—Highway Department — Public Utilities —

Highway Department not authorized to exact annual rental or revenue from public utility for use of roads and bridges by latter in maintaining electric power transmission lines.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your letter requesting our official opinion and bearing date of October 16, 1942, is as follows:

"Please advise this Department whether it has the right to charge the Alabama Power Company rental for using the Cochran Bridge as a means of carrying their transmission lines over the Mobile River.

"The State Highway Department was authorized by House Bill 876, approved September 7, 1935 (page 785 of the 1935 Acts) and amended by House Bill 339, approved February 24, 1937 (page 152 of 1936-37 Acts) to secure the above Bridge. The authority for utility lines to be located on highways and bridges by the Department is contained in Section 16 of Title 23 of the 1940 Code.

"Attached is a letter received by this Department from Mr. B. R. Powell of the Alabama Power Company relative to this question. Please advise on this matter at your earliest convenience."

From the aforementioned letter it appears that in 1927 Gulf Electric Company erected an electric transmission line across Mobile River by attaching the same to Cochran Bridge, then owned and operated as a toll bridge by the Mobile Bay Bridge Company, under an agreement whereby the Electric Company agreed to pay the Bridge Company an annual rental of \$350 for a term of five years, and \$350 annually thereafter unless the agreement was terminated by one party or the other after six months written notice.

Thereafter Alabama Power Company acquired the business and assets of the Electric Company and has continued to maintain said transmission line. The State of Alabama has acquired the bridge which has become a part of the State Highway System, free of tolls, pursuant to Act No. 366, H. 876, approved September 7, 1935 (Gen. Acts 1935, p. 785), as amended by Act No. 137, H. 339, approved Feb. 24, 1937, (Gen. Acts 1936-7, Extra Session, p. 152.)

The bridge, being a part of the State Highway System, is, of course, subject to the general supervision, under Code 1940, Tit. 23, § 13, of the highway

department. The question is whether the department is authorized by law to continue to exact an annual rental of \$350 for use of the bridge by Alabama Power Company to carry its transmission line.

After diligent search I am unable to find any authority of law whereby the Highway Department may exact or demand compensation for use of a public bridge or highway by a public utility in and about the construction or maintenance of telegraph, telephone, or power transmission lines. The statute (Code 1940, Tit. 23, §48) authorizes construction of "telegraph or telephone lines within this state * * * along the margin of the right of way of public highways, subject to the removal or change by the court of county commissioners, board of revenue, or other like governing body of the county, except in cases where the highway department has jurisdiction over such highway."

The highway department is authorized to make "rules and regulations for the better construction, repair and maintenance of the public roads and bridges in Alabama which the department shall deem proper * * * and to enter into contracts and agreements with the owners or operators of telegraph or telephone lines or power transmission lines which are constructed or operated along or across public roads, bridges and highways of this state and to prescribe all reasonable rules and regulations as to the construction, repair or maintenance of the poles, wires and lines of such telegraph, telephone and power companies so as to insure the safety of the public in using the roads, bridges and highways in this State." Code 1940, Tit. 23, §16.

Thus it is manifest in the absence of other statutory enactment (which I am unable to find), that the "jurisdiction" referred to in Title 23, §48, supra, must be the same "jurisdiction" or authority vested in the department under Section 16, Title 23. The latter jurisdiction obviously is one exercised in the interest of public safety and would seem to be limited or restricted to that extent.

While the department is authorized under Section 16 to make contracts and agreements with public utilities with reference to the construction, operation, maintenance and repair of their poles, wires and lines, such contracts and agreements and rules and regulations, in the absence of express provision or authority otherwise, must, in my opinion, relate to public safety, and cannot be stretched to include contracts or agreements, rules or regulations, whereby the department is to derive revenue or income by leasing or renting the privilege of use of highways and bridges by public utilities.

The highway department is merely an agency or instrumentality of the State, and necessarily exercises only such powers and authority as are expressly or by necessary implication vested in it by law. Nowhere do I find in the mass of statutory law relating to it any indication of legislative intent that the department should be operated for profit or as a revenue producing agency. On the contrary it operates to promote the public safety and convenience by exercise of the governmental function of buildings and maintaining roads and bridges. Its revenues and funds arise from legislative appropriation, direct or indirect.

The avowed purpose of the aforementioned acts of the legislature, where-

by the State acquired the Cochran Bridge, as expressed in their titles was "for freeing Alabama highways of all toll bridges." Acts 1935, p. 785; Acts 1936-37, Ex. Sess. p. 152. Nowhere in either the original act of 1935 or the amendatory act of 1937 is there anything to indicate any purpose on the part of the State to derive revenue, income or profit from such bridges.

I am of the opinion therefore that the Highway Department is not authorized to exact from Alabama Power Company payment of an annual rental for use of the Cochran Bridge to carry its transmission lines.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

October 30, 1942.

Hon. B. P. Singleton,
Chief Examiner of Accounts,
Department of Finance,
CAPITOL.

Fine and Forfeiture Fund — Duties of County Treasurer — of
County Depository in lieu thereof.

1. Section 33 of Title 12, 1940 Code does not nullify or eliminate
local laws dealing with Fine and Forfeiture Funds.

2. Under general law, duties of county depositories in lieu of
county treasurer are same as those imposed on county treasurers in
so far as Fine and Forfeiture Funds are concerned.

Opinion by Assistant Attorney General Russell.

Dear Sir:

Your request for official opinion bearing date of October 16, 1942, is as
follows:

"Please refer to your Opinion to Hon. W. W. Boswell, Sheriff, Geneva
County, under date of September 17, 1941, page 223 of Volume 24, and to
your Opinion addressed to B. P. Singleton, Chief Examiner of Accounts,
on Page 48 of Volume 25 and advise me in answer to the following:

"1. Does Section 33 of Title 12, 1940 Code of Alabama nullify and
eliminate the provisions of the two Local Acts dealt with in the above
opinions and pertaining to Geneva and Marshall Counties?

"2. Inasmuch as Section 33 of Title 12 specifically states that it is

the duty of the County Treasurer to receive and keep the funds pertaining to a county's Fine and Forfeiture Fund and inasmuch as this Section specifically provides 'All local laws in conflict herewith are hereby expressly repealed,' would not this provision of law likewise apply where the County had a Depository in lieu of a Treasurer, as provided by Article 2 of Title 12, Sections 43 through 53, 1940 Code of Alabama?"

It is my opinion that Section 33 of Title 12, Code of 1940, does not nullify and eliminate the provisions of the two local acts dealt with in the opinions referred to in your letter.

These Local Acts deal with the Fine and Forfeiture Funds of Geneva and Marshall Counties respectively, and it could not be said that the provisions of these acts conflict with the provisions of Section 33 of Title 12, of the Code of 1940, for the reason that this section is the general law of the State dealing primarily with duties of county treasurers. The general law of the State with reference to County Fine and Forfeiture Funds is found in Section 393 of Title 15 of the Code of 1940 and this section does not contain a provision repealing local laws in conflict therewith. It is, therefore, my opinion, in view of the fact that the general provision of law dealing with Fine and Forfeiture Funds does not repeal local laws in conflict therewith and that Section 33 of Title 12, supra, does not have the affect of regulating the Fine and Forfeiture Funds of the several counties but is merely the general law providing for the duties of county treasurers, that the local laws of Geneva and Marshall Counties dealing respectively with their Fine and Forfeiture Funds are not repealed thereby.

In answer to your second question it is my opinion that under the general law the duties of a county depository in lieu of a county treasurer are the same as those imposed upon County treasurers in so far as the Fine and Forfeiture Fund is concerned.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

November 2, 1942.

Hon. Howard Kirby, Clerk,
Circuit Court of Etowah County,
Gadsden, Alabama.

Costs and fees —

1. Fees of clerk-recognizance. Recognizance is an obligation of record in the nature of a conditional judgment for which the clerk is entitled to fifty cents for entering of record.

2. A prisoner can be released on his own recognizance only in misdemeanor cases.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your letter of October 26, 1942, in which you request an official opinion, is as follows:

"Please advise me in what instances am I entitled to charge a recognizance fee of 50c."

In answer to your inquiry I call attention to Section 187 of Title 15, Code 1940, which is as follows:

"§187. Prisoners entitled to opportunity to give bail.—All judges shall take care that every prisoner in jail shall have an opportunity to give bail, and may approve any bonds presented to him at any time, which in his judgment is reasonably good, and may in his discretion release on his own recognizance any prisoner charged with a misdemeanor."

It will be noted that the above quoted provision provides that a judge may in his own discretion release one charged with a misdemeanor on his own recognizance. When this is done it takes the place of an appearance bond and merely places the defendant on his honor to appear at any time that might be set by the judge to answer the charge against him. Cf. Biennial Report of Attorney General, 1928-30, p. 508.

When such an order is made by a judge the clerk is entitled to the fee of fifty cents provided for in Section 89, Title 11, Code of 1940, for entering this recognizance of record.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

November 4, 1942.

Hon. W. E. Mauldin,
Superintendent of Education,
Double Springs, Alabama.

Schools — County Board of Education — Authority to Purchase
Scales —

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for official opinion bearing date of October 31, 1942, is as follows:

"Will it be legal for a County School Board to buy scales for schools, as recommended by the County Health Department."

The good health of our school children is a necessary prerequisite to their obtaining an education. In view of our public school system and the resulting concentration of large numbers of children together it is of the utmost importance that close guard be kept on their health and well-being. Our legislature, in recognition of this fact, provided for the physical examination of all pupils attending public schools, and also provided for a program of physical education. Code, 1940, Title 52, Chapter 32, (Sections 553 et sequitur). Physical examination of school children is also specifically provided by Code of 1940, Title 52, Sections 15 and 52.

This office has heretofore held that county boards of education may expend moneys for the purchase of athletic equipment for the purpose of its program of physical education. Biennial Report of Attorney General, '36-'38, pages 3 and 261. This office has also held that county boards of education are authorized to make appropriations to county health departments to be used for public health services connected with the school system. Biennial Report of Attorney General, '36-'38, page 783.

The premises considered, it is my opinion that the expenditure of public school funds by a county board of education for the purchase of scales, as recommended by a county health department is an expenditure for public school purposes and is authorized. Of course, such purchases must be made from funds legally available for such purposes.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

November 5, 1942.

Miss Lucile Golden,
Clerk and Register, Circuit Court,
Elmore County,
Wetumpka, Alabama.

Clerks — Fees — When case appealed and reversed — When later nol. prossed.

1. A clerk is entitled to trial fee and judgment fee where a defendant is convicted for a criminal offense although case is appealed and reversed.

2. After a case is appealed and reversed and then nol. prossed, clerk is entitled to a fee for entering judgment only.

Opinion by Assistant Attorney General Haynes.

Dear Madam:

Your request for official opinion, bearing date of October 23, 1942, is as follows:

"Will you please give me an opinion on the following matter:

"In the case of the State v. Henry Taylor the defendant was granted a new trial by the Court of Appeals. Now at the last term of our Circuit Court the case was nol prossed. What fees will the Clerk be allowed? Will I be allowed fee for trial and final judgment? I know that when cases are nol prossed we are not allowed these fees, but in this case there was a trial and final judgment."

It is my opinion that you are entitled to trial fee and also a fee for writing judgment in the proceedings you indicate above up to and including the conviction of the defendant in the circuit court, from which conviction and judgment the defendant appealed, but when the case was reversed and remanded to the circuit court where the case was nol. prossed you would be entitled to a fee for writing judgment but not a fee for trial as in the last instance there was no trial.

This is based on an opinion of this office now in manuscript written to Hon. Howard Kirby, Clerk of the Circuit Court, Etowah County, Alabama, a copy of which I am enclosing. This opinion holds:

"1. A circuit clerk is entitled to a fee of twenty-five cents, as provided for in Code 1940, Title 11, Section 89, for entering judgment as to a defendant in a case in which a nolle prosequi is entered."

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

November 12, 1942.

Hon. E. E. Gewin,
Tax Assessor,
Hale County,
Greensboro, Alabama.

Taxation — Buildings and Improvements on Land —

Except where the rule is changed or modified by statute or agreement, buildings or other improvements constructed upon land of another become part of the realty for the purposes of taxation and may not be taxed to the builders or lessees, either as realty or as personalty, and become taxable to the landlord as realty.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your letter of October 29, 1942, in which you request my opinion, is as follows:

"I am writing you in regard to our telephone conversation this afternoon. On investigation I find that there are eight or more farms in the southern part of Hale County that have improvements on them built by the Farm Security Administration. I talked to one of the Farm Security Administration's supervisors and he told me this: that the F. S. A. had leased this land from the landowner and had put the improvements on the land, with the understanding that at the end of the lease the improvements would belong to the landowner. I have tried to get some of these landowners to add these improvements to their land assessments and they have refused to do so. I think these improvements are taxable. These improvements would amount to several thousand dollars. Please advise me by return mail who is liable for the taxes on these improvements. These improvements are stationary and are not movable and are therefore part of the land."

The general rule of law is that, except where the rule is changed or modified either by statute or agreement of parties, buildings or other improvements constructed upon land of another become part of the realty for the purposes of taxation and may not be taxed to the builder or lessee, either as realty or as personalty and become taxable to the landowner as realty. 61 C. J. p. 187, Section 150; 61 C. J. p. 209, Section 183.

Our tax laws take cognizance of this rule of law and have applied it in Code 1940, Title 51, Section 1. Subdivision (b) of this section is as follows:

"(b) The term 'real property' shall be held to mean and include not only land, city, town and village lots, but also all other things thereunto pertaining, and all structures, and all other things so annexed or attached thereto as to pass to a vendee by the conveyance of the land or lot."

We know of no statute, either state or federal, that modifies the general rule above stated.

You have forwarded to this office as a part of your request copies of paragraphs 3, 5 (a) and 6 (a) and (b) of a purported lease between Black Belt Cooperative Leasing Association and the landowners. These provisions seem to be drawn in recognition of the general principles above stated and go even further by specifically providing that the landlord shall pay the taxes. Under the above law and lease contract, the land and improvements made thereon during the leases are subject to taxation as the property of the landlord, that is to say, that when the improvements are made they become a part of the land and are taxable as such.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

November 17, 1942.

Dr. Douglas L. Cannon,
Assistant in Administration,
Department of Public Health.
CAPITOL.

Public Health — Isolation and Quarantine — Venereal Disease —

1. County Health Officer has authority to isolate and quarantine persons infected with venereal disease.

2. County Health Officer has authority to isolate and quarantine persons who have been in contact with a person or persons afflicted with venereal disease.

3. Where County Health Officer causes the isolation and quarantine of persons because of venereal disease, he does not violate the provisions of Title 22, Section 269, Code of Alabama, 1940, which requires that all information and records concerning persons infected with venereal disease shall be kept confidential.

Opinion by Assistant Attorney General Flowers.

Dear Sir:

I have your request for official opinion under date of November 4, 1942, which is as follows:

"Section 264 of Title 22 of the 1940 Code of Alabama gives a county health officer the right to isolate or quarantine persons infected with

venereal disease, whenever in his judgment such course is necessary to protect the public health. Such right, however, does not seem to prevail in the case of those who have been in contact with the disease and who are suspected of having it although the diagnosis has not been definitely established; and this despite the fact that the quarantine of contacts is provided for in the case of many other diseases. Your opinion is requested as to the right of a county health officer to quarantine contacts to cases of venereal disease. If such provision does not now seem to exist in the law, do you think the State Board of Health has the authority to make it mandatory through rules and regulations to be adopted under Subsection 6 of Section 7 of Title 22 of the 1940 Code of Alabama?

"Further, your opinion is sought as to the existence of conflict in Sections 264 and 269 of Title 22. It will be noted from the latter that all information concerning persons infected with venereal diseases shall be confidential. Could a health officer be held as violating this provision should he institute isolation and quarantine in the case of individuals found to be infected with or in contact with venereal diseases?"

The answer to your inquiry will be found in an analysis of certain statutes, the provisions of which appear to be clear and unambiguous.

Title 22, Section 264, Code of Alabama, 1940, provides in part as follows:

"§264. Persons required to be treated.—* * * Whenever in the judgment of the county health officer such a course is necessary to protect the public health, persons infected with venereal disease shall be isolated or quarantined. * * *

Title 22, Section 74, Code of Alabama, 1940, provides as follows:

"§74. Isolation and detention of cases of disease.—Whenever the state health officer or his representative, or the county health officer or his representative, shall be notified of any person or persons afflicted with any of the diseases named in Section 47 of this title or having been in contact with a person or persons afflicted with any one of the diseases named in section 47 of this title, he shall at his discretion isolate or quarantine such person or persons. Such quarantine shall be established and maintained in accordance with the rules and regulations adopted by the state board of health for the control of the disease with which the person or persons is afflicted."

Title 22, Section 47, Code of Alabama, 1940, provides in part as follows:

"§47. Notifiable diseases listed.—The following diseases and disabilities are hereby made and declared to be notifiable diseases, and occurrence of cases shall be reported as herein provided: Group A. Infectious diseases, viz., * * * chancroid * * * gonorrhea, granuloma venereum, * * * lymphogranuloma inguinale, * * * syphilis, * * *

Title 22, Section 268, Code of Alabama, 1940, provides as follows:

"§268. County health officer takes steps to prevent spread of disease.

—Upon receipt of a report of a case of venereal disease, the county health officer, or the state health officer, shall institute such measures for the protection of other persons from infection by such venereally diseased person as said health officer is empowered to use to prevent the spread of other contagious, infectious or communicable diseases.”

In the case of **Parke et al. vs. Bradley, State Treasurer**, 204 Ala. 455, 86 So. 28, The Supreme Court of Alabama speaking through Somerville, J., had the following to say:

“The prevention of disease and the conservation of health, by all of the means known to modern science, is universally recognized as one of the most important and imperious duties of government, and in the construction of statutes enacted for such a purpose, under the police powers of the state, courts are agreed that great latitude should be allowed to the Legislature in determining the character of such laws, and how, when, and by whom, in their practical administration, they should be applied. *State vs. McCarty*, 5 Ala. App. 212, 59 South. 543, approved in *Ferguson v. Starkey*, 192 Ala. 471, 68 South. 348; 12 R. C. L. 1271, §10, and cases cited.”

In view of the provisions of Section 264, *supra*, the County Health Officer is authorized to isolate and quarantine persons infected with venereal disease. I am also of the opinion that in view of the provisions of sections 74, 47, & 268, *supra*, a County Health Officer is authorized to isolate and quarantine persons who have been in contact with a person or persons afflicted with venereal disease.

As to your second question, I am of the opinion that a County Health Officer does not violate the statutory mandate as provided by Title 22, Section 269, when he quarantines or isolates a person infected with venereal disease, or when he so quarantines or isolates a person who has been in contact with a person or persons infected with venereal disease.

Section 269, *supra*, provides as follows:

“§269. Reports and information as to venereal diseases confidential. —All information and reports concerning persons infected with venereal diseases shall be confidential and shall not be accessible to the public, except insofar as publicity may attend the performance of the duty imposed upon the county health officer in the preceding section.”

It will be noted that the statute requires that all information and reports shall be confidential; however, it will also be noted that this requirement is subject to the following qualification “except insofar as publicity may attend the performance of the duty imposed upon the county health officer in the preceding sections.”

When the Health Officer imposes quarantine or when he isolates in accordance with the provisions of the statutes, he is engaged in performance of

the "duty imposed upon the county health officer in the preceding sections," and in such case he comes within the exception contained in Section 269, supra.

To sum up the foregoing conclusions, it is my opinion that a County Health Officer has authority to isolate and quarantine a person infected with venereal disease; it is also my opinion that a County Health Officer has authority to isolate and quarantine persons who have been in contact with a person or persons afflicted with venereal disease; and it is also my opinion that in effecting such isolation and quarantine of persons because of venereal disease, the County Health Officer does not violate the provisions of Section 269, supra, whereby it is required that all information and records concerning persons infected with venereal disease shall be kept confidential.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

November 18, 1942.

Hon. B. P. Singleton,
Chief Examiner of Accounts,
CAPITOL.

Code 1940, Tit. 51, §§388, 392 — Income Tax—Trusts and Estates
— Exemption —

1. Income paid, credited or payable to a beneficiary from a trust estate during the tax year is deductible from income reported by the fiduciary or trustee and tax on such income must be paid by the beneficiary.

2. As to all other income accruing to a trust estate during the tax year, and not paid, payable or credited to the beneficiary during such year, the fiduciary or trustee is entitled to an exemption of \$1500 and must pay the tax on the balance of income remaining after such deduction of exemption.

3. If two or more trusts with the same trustee for the benefit of but one beneficiary may be legally construed as constituting a single trust designed to evade the income tax law only one exemption of \$1500 should be allowed to the trustee although income from said trusts is not payable within the tax year.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for my official opinion, bearing date of November 9, 1942, is

as follows

"We are now conducting an examination of the Income Tax Division of the State Department of Revenue and find several returns wherein one individual is made the beneficiary of several trusts, set up from earnings from virtually the same source, each trust claiming and deducting \$1500 exemption.

"Please refer to Sections 388 and 392 of Title 51 advise me in answer to the following question:

"Does the law grant \$1500.00 exemption on trust incomes in more than one instance, such as where several trust accounts are set up for any one person who is sole beneficiary of each trust?"

Under Code 1940, Tit. 51, §392, fiduciaries are required to make returns or reports of income received by them in course of administration of trust estates.

Such estates fall roughly into two classes: first, trusts of which the income is accumulated for future payment or distribution; second, trusts of which the income is to be paid or credited to the beneficiary presently or within the current income tax year.

The first class relates to income referred to in Subdivision (1), brackets (a), (b), and (c) of Section 392, and includes income accruing to decedents' estates during course of administration, and income accumulated and held for future distribution, for the benefit of unborn or unascertainable beneficiaries or for the benefit of designated beneficiaries, whose use and enjoyment thereof has been postponed beyond the end of the current income tax year.

The second class includes and is confined to trust estates of which the income "is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held, or distributed as the court may direct." Section 392, supra, Subd. (1) bracket (d).

The statute itself indicates the distinction between the two classes and provides separate and distinct procedure for each class. It group brackets (a), (b) and (c) together, and treats bracket (d) as a class apart.

As to the first class the statute provides that "the tax shall be imposed upon the net income of the estate or trust and **shall be paid by the fiduciary;**" with proviso, however, for deduction of any "amount of income properly paid or credited to any legatee, heir or other beneficiary."

The only exemption under Section 392 relates to income accruing under the first class, brackets (a), (b) and (c), amounting to \$1500, "allowed to single persons under Section 388 of this title."

As to the second class of trust estates (bracket d) and income paid or

credited to any beneficiary as aforesaid in course of administration, the statute expressly provides "the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary his distributive share whether distributed or not, of the net income of the estate or trust for the taxable year."

Thus it appears that the question whether a fiduciary is entitled to the \$1500 exemption depends upon whether the income returned or reported by him is paid or credited, or should under the terms of the trust be paid or credited within the tax year for which he reports, or whether such income, according to the trust, must be held for future payment or distribution beyond the end of the tax year. In the latter event the identity of the beneficiary is not in my opinion a material factor, and as to each separate trust the \$1500 exemption under the express terms of the act itself is authorized.

If, however, the trust income, under the terms of the trust, is payable or to be credited, or is in fact paid or credited, to the beneficiary, the exemption is not authorized as to such income, and the tax thereon must be paid by the beneficiary himself, who is entitled, of course, to but one exemption, the amount of which depends upon his personal status as provided by Section 388.

I am unable to answer your inquiry except as above on account of the fact that it does not disclose the terms of the trusts in question and does not show whether the "sole beneficiary" to whom you refer received or was credited with the various "trust incomes" referred to, or should have been paid or credited therewith according to the various trust indentures.

In conclusion it may be said that if in fact the various declarations or indentures of trust were obviously designed as an evasion of the law, and that when taken and construed together they clearly constitute only one trust estate, although payment of income to the beneficiary is deferred or postponed beyond the end of the tax year, in such event but one exemption should be allowed. Without examination of the instruments themselves it is impossible to determine this question.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

November 20, 1942.

Hon. W. O. Dobbins, Jr., Director,
Alabama State Planning Commission,
2 North Perry Street,
Montgomery, Alabama.

Alabama State Planning Commission — Municipal Planning
Commission —

1. Municipalities authorized to create municipal planning commission by ordinance only. Title 37, Section 787, Code of Alabama, 1940.

2. Governing body of the municipality not authorized to create municipal planning commission by resolution or appointment.

Opinion by Assistant Attorney General Lurie.

Dear Sir:

I have your request for official opinion under date of November 9, 1942, which is as follows:

"A question has arisen on which we would like to have an opinion from your office.

"In the event that a planning board in a town has been established on the basis of resolution passed and adopted by a city council or city commission, will this suffice to give such a board the official status as a city planning commission?

"You are referred to Title 37, Sections 786-808 of the Alabama Code of 1940, in which the procedure for the establishment and functioning of a city planning commission is set forth.

"Our reaction to this is that the law requires compliance with the requirements as set forth in Section 787 and 788 for such a planning body to enjoy and have the powers of an official planning commission. Since such commissions are empowered with the duty and authority of zoning commissions and since the enforcement of zoning ordinance provisions may involve future litigation, we would consider it unwise for a planning group to proceed on any basis other than the steps as set forth in the above numbered sections, which relate to the establishment of a municipal planning commission with official status."

In my opinion your inquiry should be answered in the negative.

Title 37, Section 787, Code of Alabama, 1940, provides as follows:

"§787. Grant of power to municipality.—Any municipality is hereby authorized and empowered to make, adopt, amend, extend, add to, or

carry out a municipal plan as provided in this article and create by ordinance a planning commission with the powers and duties herein set forth. The planning commission of a city shall be designated city planning commission; of a town or village, town or village planning commission; and of any other municipality, such designation as its council may specify."

It is evident that the manifest intention of the above section is to grant the privilege to municipalities of creating such a planning commission; and, in the exercise of this right it is necessary to follow the procedure as set out and specified in the Code of Alabama. Further reference to the creation of such commission by ordinance is found in Title 37, Section 788, Code of Alabama, 1940, which provides in pertinent part as follows:

"§788. Personnel of municipal planning commission; compensation; terms of office, etc.—The commission shall consist of nine members, namely, the mayor, one of the administrative officials of the municipality selected by the mayor, and a member of council to be selected by it as members ex-officio, and six persons who shall be appointed by the mayor, if the mayor be an elective officer, otherwise by such officer as council may in the ordinance creating the commission designate as the appointing power * * *."

The following sections of the 1940 Code provide for the duties and powers of such a planning commission:

"§791. General powers and duties of commission.—It shall be the function and duty of the commission to make and adopt a master plan for the physical development of the municipality, including any areas outside of its boundaries which, in the commission's judgment, bear relation to the planning of such municipality. Such plan, with the accompanying maps, plats, charts, and descriptive matter shall show the commission's recommendations for the development of said territory, including, among other things, the general location, character, and extent of streets, viaducts, subways, bridges, waterways, waterfronts, boulevards, parkways, playgrounds, squares, parks, aviation fields, and other public ways, grounds and open spaces, the general location of public buildings and other public property, and the general location and extent of public utilities and terminals, whether publicly or privately owned or operated, for water, light, sanitation, transportation, communication, power and other purposes; also the removal, relocation, widening, narrowing, vacating, abandonment, change of use or extension of any of the foregoing ways, grounds, open spaces, buildings, property, utilities, or terminals; as well as a zoning plan for the control of the height, area, bulk, location, and use of buildings and premises. As the work of making the whole master plan progresses, the commission may from time to time adopt and publish a part or parts thereof, any such part to cover one or more major sections or divisions of the municipality or one or more of the aforesaid or other functional matters to be included in the plan. The commission may from time to time amend, extend, or add to the plan."

"§795. Miscellaneous powers and duties of commission.—The commission shall have the power to promote public interest in and understanding of the plan and to that end may publish and distribute copies

of the plan or of any report and may employ such other means of publicity and education as it may determine. Members of the commission, when duly authorized by the commission, may attend city planning conferences or meetings of city planning institutes or hearings upon pending city planning legislation, and then commission may, by resolution spread upon its minutes, pay the reasonable traveling expenses incident to such attendance. The commission shall, from time to time, recommend to the appropriate public officials programs for public structures and improvements and for the financing thereof. It shall be part of its duties to consult and advise with public officials and agencies, public-utility companies, civic, educational, professional, and other organizations, and with citizens with relation to the protecting or carrying out of the plan. The commission shall have the right to accept and use gifts for the exercise of its functions. All public officials shall, upon request, furnish to the commission, within a reasonable time, such available information as it may require for its work. The commission, its members, officers, and employees, in the performance of their functions, may enter upon any land and make examinations and surveys and place and maintain necessary monuments and marks thereon. In general, the commission shall have such powers as may be necessary to enable it to fulfill its functions, promote municipal planning, or carry out the purposes of this article."

"§796. Zoning.—The commission shall have all powers heretofore granted by law to the zoning commission of the municipality, and, from and after the creation of a planning commission in such municipality, all powers and records of the zoning commission shall be transferred to the planning commission; Provided, however, that in the event that the existing commission shall be nearing the completion of its zoning plan, council may, by resolution, postpone the said transfer of the zoning commission's powers until the completion of such zoning plan; but such postponement shall not exceed a period of six months."

"§797. Subdivision jurisdiction.—The territorial jurisdiction of any municipal planning commission over the subdivision of land shall include all land located in the municipality and all land lying within five miles of the corporate limits of the municipality and not located in any other municipality, except that, in the case of any such nonmunicipal land lying within five miles of more than one municipality having a planning commission, the jurisdiction of each municipal planning commission shall terminate at a boundary line equidistant from the respective corporate limits of such municipalities."

Your attention is directed to Article 2 of Title 37, Section 774 to 780, inclusive, Code of Alabama, 1940, in which provision is made for a zoning commission for municipalities and the duties defined therefor. Section 780 provides as follows:

"§780. Zoning commission.—In availing itself of the powers conferred by this article, the legislative body of any incorporated city or town may appoint a commission to be known as the zoning commission, to recommend the boundaries of the various original districts and appropriate regulations to be enforced therein. Such commission shall take a preliminary report and hold public hearing thereon before submitting its final report. In case of the appointment

of such zoning commission, the municipal legislative body shall not hold its public hearings or take action until it has received the final report of such commission. Where a city plan commission already exists, it may be appointed as the 'zoning commission'."

A municipal zoning commission may be created by appointment by the governing body of the municipality in accordance with said Section 780, *supra*. However, the powers and duties of a municipal **zoning** commission and a municipal **planning** commission are not the same as is indicated by the Code Sections recited herein.

A careful examination of the sections applicable to zoning commission reflects the duties prescribed to be directed to a condition existing or about to exist, affecting the present status of a city or town. Those sections describing the powers and duties of a planning commission include those embraced by the zoning commission and further provide for planning toward the future growth and development of the municipality together with the general growth of the State and envelope a much greater sphere of activities extending beyond that granted to a zoning commission. In view of this fact it is apparent that the creation of such larger commission necessarily occupies a more prominent position and thus the provisions under Section 788, *supra*, for an ordinance to give the populace notice of same are in keeping with the general design and scheme of such commission.

Every municipality derives its powers from the State and can exercise only those powers granted in express words, those necessarily or fairly implied incidental to the powers expressly granted, and those essential to the declared objects and purposes of a corporation. **Mobile vs. Mobile etc. R. Co.** 141 Ala. 442, 38 So. 127, **Cleveland School Furniture Co. vs. Greenville**, 146 Ala. 559, 41 So. 862. The statutory provisions governing the creation of a planning commission are clear in their expression and it is mandatory upon the municipal authorities to proceed in accordance therewith.

I have been unable to find anywhere in the laws of this State a provision for the creation of a municipal planning commission other than by ordinance as provided by Title 37, Chapter 3 of the Code of Alabama, 1940.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

November 20, 1942.

Hon. E. T. Knight, Chairman,
Board of Revenue,
Cullman County,
Cullman, Alabama.

Court of County Commissioners — Clerk —

Clerk of Board of Revenue not prohibited from contracting with county.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for my official opinion bearing date of November 6, 1942, is as follows:

Please give me your opinion on the following matter:

"Under a local law creating the Cullman County Board of Revenue, sets out a salary of \$100.00 per month for a bookkeeper or clerk of the board.

"We members of the board feel that this salary is not enough for the amount of work our bookkeeper has to do, much less with the responsibility which he has to assume in the discharge of his duties, and too, this salary is not in keeping with the added cost of living expenses of to-day.

"Now we have been advised that we could increase our book-keeper's salary by giving him some additional responsibilities, for instance we had in mind of appointing him assistant purchasing agent and custodian of county property. For this added work and responsibility, pay him out of the General Fund in a separate check a reasonable amount for this service. Can we legally do this?"

It is my opinion that your inquiry should be answered in the affirmative.

The Board of Revenue of Cullman County is authorized by Section 6 of Act. No. 357, H-859, (Local Acts of 1939, page 244) to employ a clerk to keep the minutes and financial records of the county.

This act provides that the clerk's salary cannot exceed \$100 per month. The act is clear and specific as to his duties and as to the maximum compensation which the clerk may be paid for such services, and the clerk could not, in my opinion, be paid more than \$100 per month for performing such services.

The question then arises as to whether or not such clerk can enter into another contract of employment with the county for the performance of other duties.

Certain county and state officers are specifically prohibited from contracting with the county by Code 1940, Title 41, Section 211. Clerks of county governing bodies, however, clearly do not come within the prohibition of this section.

Section 280, Constitution of 1901, prohibits any person from holding two offices of profit under this state at the same time. The clerk of the Board of Revenue of Cullman County does not hold an office of profit within the meaning of this section. The clerk is an employee of the Board of Revenue, subject to be appointed or discharged by the Board at its discretion. Biennial Report of the Attorney General, 1936-38, page 108.

Therefore, the premises considered, it is my opinion that the clerk of the Board of Revenue of Cullman County is not prohibited from entering into another contract of employment with Cullman County provided it is for the performance of duties not covered by his present employment as clerk, and provided that such contract of employment does not interfere with the performance of his duties as such clerk.

Of course, any such contract would have to be for a purpose for which the county is authorized by law to expend monies.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

November 23, 1942.

Hon. W. L. DeVan, Administrator,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alabama Alcoholic Beverage Control Board — Retail Liquor
Licenses —

The Alabama Alcoholic Beverage Control Board, where an application for renewal of liquor license is filed under the provisions of Section 30, Title 29, Code 1940, and no objection is filed to the renewal of such license, in its sound discretion, shall pass upon the application's sufficiency and truthfulness and shall determine whether or not such person should be granted a renewal license.

Opinion by the Attorney General.

Dear Sir:

Your request for official opinion bearing date of November 7, 1942, is as follows:

"Please refer specifically to Sections 29 and 30 of Title 29, Code of Alabama 1940, Chapter 1 and advise if:

"1. The Board may, in the absence of a specific complaint against the operation of a licensed establishment, refuse to renew the license for 1943

"OR

"2. If you construe the Law to mean that the Board has no discretion in the matter and must renew said License upon the filing of an application and payment of the required fee.

"Your prompt reply will be greatly appreciated inasmuch as time is limited in which to establish a definite policy in this connection."

The request for an opinion in this instance cites Code 1940, Title 29, Sections 29 and 30, but it appears that the question propounded for an answer rests upon a construction of Section 30. This section authorizes a person who is operating under a license previously issued to him to file an application for renewal of his license. This application must be filed at least sixty days before the expiration date of the license under which he is then operating and, on so filing the application and the payment of the application fee and the license fee as in the case of an original applicant for license, the Board shall issue such renewal license unless, within one month of the date of the filing of the application for a renewal, the Board notifies the applicant that objection to the granting of the renewal license has been filed by some person authorized to file the same. The concrete question to be answered is, Is it mandatory upon the Board to issue the license where no objections have been filed? An incidental question is, What effect does the filing of an objection have upon the issuance of such license?

A correct answer to the questions rests upon some general principles of law and the provisions of other sections in the legislative enactment. At the threshold of this investigation, it is important to determine the status and rights of one seeking a license to sell intoxicating liquors. On this subject, our Supreme Court has said:

"It is universally recognized that the act of engaging in the sale of intoxicants may be wholly forbidden, and that a license to engage in the traffic in liquors is a privilege merely, revocable at the will of the superior granting power; that there is in it no element of property right or vested interest of any kind."

Continuing on this subject, the court said:

"In other words, it would seem that the selection of the beneficiaries of a mere privilege, not involving a matter of right, may be committed to the discretion of a body created for that purpose, and so, without impinging upon any vested right of one who desired to enjoy the privilege, or, from whom it was, in the discretion of the body, withdrawn."

State ex rel. Crumpton v. Montgomery, et al., Excise Commissioners, 59 So. 294, 301.

This case states another well-recognized principle of law that "a discretion of selection may be vested in an administrative body * * * to promote or effectuate the execution of the law." (p. 302) It is also a well-settled principle of law that one who seeks the benefit of a granted privilege must comply with all the conditions attached in order to acquire the privilege.

Section 30, under consideration, requires that before the license is granted there must be filed with the Board an application therefor. The character and contents of the application are not stated. In fact, it does not state with whom the application must be filed but this section shows that an application (referred to as an original application) had theretofore been filed and a license thereon granted. I must look elsewhere in the enactment for this information for it is evident that I am not authorized to presume that the Legislature would dispose of the subject in such a vague manner.

Section 26 of this Title provides that application for a license must be filed with the Board and that, at the time of making the application, payment must be made for the filing fee of \$10. Section 27 of this Title catalogues in great detail what the application shall contain and then says that "the application must be verified by affidavit of applicant, and if any false statement is intentionally made in any part of the application, the affiant shall be deemed guilty of perjury." Immediately following this quotation it says:

"A license shall not be granted by the board unless the application contains the information herein required, and the premises meet such reasonable sanitary requirements as the board by regulations shall prescribe."

The requirement here that the premises must meet such reasonable sanitary requirements as the Board may prescribe is not mentioned in the contents of the application and it makes an additional requirement in order to procure a license. The next section (28) closes by requiring that, "Licenses shall be granted by the board only to reputable individuals, or to associations, partnerships and corporations whose members or officers and directors are reputable individuals." From these quoted provisions, the conclusion logically follows that the application for a renewal of the license provided for in Section 30 must be the same as the application for the original license. They are dealing with the same subject—conditions required for the issuance of a license. There is nothing in the enactment authorizing the conclusion that the application for the renewal license is intended to be different from the original application and, confessedly, the word "application" provided for in Section 30 harkens back to the word "Application" found in Sections 26 and 27. These conclusions are reinforced by the fact that no mention is made in Section 30 of what the application for renewal license shall contain. Certainly it must contain something and if had been intended that it should contain something other and different from the original application, I am forced to conclude that the Legislature would have so stated.

The latter part of Section 27 forbids the issuance of a license unless the

application contains "the information" required. This application furnishing this information is to be filed with the Board for the undoubted purpose of furnishing information to the Board to be examined and investigated by it to ascertain the truth thereof. If some of these mandatory requirements are found by the Board to be false, then it may refuse to issue a license, otherwise it is rank folly to make the requirements.

Section 5 of this Title 29 vests the Board with the duty and the power "To grant, issue and suspend or revoke for cause liquor licenses, and alcohol permits, as provided in this chapter. To grant, issue and suspend or revoke for cause malt or brewed and vinous beverage licenses, as provided in this chapter." If the Board, after investigation, finds that the application sets forth the truth, this is not enough to entitle the applicant to a license. The Board must go outside of the application and find that "the premises meet such reasonable sanitary requirements as the Board by regulation, shall prescribe." (Section 27, Subdivision 9) All this is not enough. There is one more vital requirement, "Licenses shall be granted by the Board **only to reputable individuals**." (Emphasis supplied) (Section 28) This is a mandatory requirement and one of the essential conditions on which a license is to be granted. The statement that "licenses shall be granted by the Board only to reputable individuals" is all inclusive and applies to the granting of all licenses, whether on original application or on application for a renewal license. This Beverage Control Act repeatedly requires that the person applying for a license shall be of good character or be a reputable person, showing a fixed purpose on the part of the Legislature that no person under any conditions or contingencies shall be granted a license who does not bear a good reputation.

The application for license, as I have shown, does not include the requirement that the applicant shall be a reputable person. It necessarily follows that the Board must ascertain this fact before issuing the license. A reading of this Title (29), Sections 1-78, discloses that broad functions, duties and powers are vested in the Board, the exercise of which calls for discretion. Without undertaking to cite all these provisions, I will rest on a few.

In Section 2 it is provided, "The provisions of this chapter, through the instrumentality of the board, and otherwise, provide the means by which such control shall be made effective." In Section 5, the Board is authorized "To control the possession, sale, transportation and delivery of alcoholic beverages" and "to determine the location within which state stores shall be established." This section contains many other powers where the exercise of discretion is required. Section 6 vests the Board with authority to make such regulations as it shall deem necessary. Section 7, 42 and 58 set out other discretionary powers.

Coming again to Section 30 of this Title, the reason is compelling that the application for renewal must be of the same kind as the application for an original license; that the Board is clothed with the same duty and discretion to investigate the application; that the Board must ascertain that the premises meet reasonable sanitary requirements and it must appear to the Board that the applicant is a reputable individual.

If any of these specific requirements are lacking, it is clear from the law that it is the duty of the Board to deny the application and decline to issue

the license. Other sections of this law require that the license shall be issued annually. The clause in Section 30 that authorizes a third party to file objections to the issuance of a license has no influence whatever on the form and contents of the application nor does it, in any manner, give rise to a conclusion that the Board is required to issue a license to an applicant simply because he had a license for the preceding year. Conditions may have changed. The premises on which the business is carried on may have changed. His reputation may have changed.

On original applications for licenses, it seems to leave all investigations in the hands of the Board but, by this very added clause, it authorizes a third party to come into the case where the party is applying for a renewal of his license. There may be a good reason for this. He has conducted the business in the community or location for a year and the people and citizens may have ascertained that he has not conducted the business as he should and that he has been abusing the privileges granted to him and the lawmakers wisely provided that third parties may come in when he seeks a renewal so that they may formally disclose to the Board the manner in which he has been conducting his business and himself the preceding year. When this objection is filed by a third party, the Board is required to give notice to the applicant. The filing of this objection and the notice thereof do not end the proceedings and stop the Board from a consideration of the applications nor does the fact that no objections are filed deny the right and duty of the Board to pass upon the application and determine its sufficiency and truthfulness and also to pass upon the question of the reputation of the applicant. When an objection is filed and notice given to the applicant, the effect is a suit between the parties where all these questions may be heard and determined. The provisions of the Code, Title 29, Sections 1 et seq., now under consideration, are in a large degree taken from General Acts, 1911, pp. 249-288.

The Supreme Court had that act before it in the case of **Excise Commission v. Skinner**, 179 Ala. 654, where the court said:

"In passing upon an application for license, whether objected to or not, the Commission acts judicially; and, when a contest is instituted by a qualified elector by filing a written objection to the granting of the license, it becomes in effect a suit inter parties."

This same act again came before the court in the case of **Yielding v. Bland, et al.**, 184 Ala. 62. The proceeding was one for mandamus seeking to compel the Excise Commission of Cullman County to issue a license to sell whiskey. The suit was based upon Section 7 of the act, the material part of which is quoted by the court as follows:

"Sec. 7 (Acts 1911, p. 254) provides: 'Where the total number of applicants is in excess of the number of licenses allowed by law it shall be the duty of the commission to order the issuance of license to such of the applicants as in their opinion are best fitted to carry on the business of selling spirituous, vinous or malt liquors, provided always, that applicants already possessing a license issued during the previous year shall have preference over new applicants. Upon the expiration of each license, the excise commission shall, unless the licensee has forfeited his right under the provisions of this act, issue a certificate to the probate judge to renew said license without the necessity of any formal application on the part

of the licensee therefor, upon the required bond being made and paying the necessary license tax and fees therefor.'" (p. 64)

Commenting on these provisions, the court said:

"It is manifest, we think, that the legislative intent, as expressed in the quoted part of section 7, did not contemplate the denial to the commission of the exercise of discretion and choice in cases where a licensee desired a renewal of his license. Indeed the preference particularly assured to the licensee for the previous year evinces an unmistakable, unequivocal purpose to leave with the commission the like discretion and the duty of choice, vested in excise commissions by that enactment, to commit the license to him, of two or more applicants, who, in the commission's opinion, was best suited to carry on the business."

The act here, in a mandatory form, says, "The applicants already possessing a license issued during the previous year **shall have preference over new applicants.**" (Emphasis supplied) Continuing, the court said:

"Certainly if the lawmakers had intended to vest one licensed the previous year with such an important, absolute right, in derogation of the commission's function as just preceding they had prescribed, the expression of such a purpose would not have been undertaken through a provision touching merely the formality of application for renewal.

"The law's intent being so, the commission's act in denying a renewal to petitioner was within the discretion reposed by law in that body. Its exercise cannot be reviewed or revised by recourse to the writ of mandamus." (p. 65)

I conclude that where an application for renewal of the license is filed under Section 30 of Title 29 of the Code and no objection is filed, the Board, in the exercise of a sound judicial discretion, shall pass upon the application's sufficiency and truthfulness and also determine whether the premises meet such reasonable sanitary requirements as the Board shall prescribe and whether the applicant is a reputable person. If any of these are reasonably lacking, the Board may decline to issue the license. In the event an objection is filed under this Section 30, then it is the duty of the Board to give notice, of the filing of such objection and provide for a hearing of the parties on the objection under such reasonable regulations as the Board may prescribe. The Board may find in favor of or against the objection. In either event, the Board may grant or refuse the license after a review of the whole record in connection with its independent findings.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

December 3, 1942.

Hon. Thomas W. Jones,
Judge of Probate,
Madison County,
Huntsville, Alabama.

Motor Vehicles—License—

Motor-bike liable for motorcycle license.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your request for official opinion bearing date of November 21, 1942, which is as follows:

"We have had several inquiries as to whether a Motor-Bike is liable for a tag to be operated on the highways and streets of Huntsville. Several of these motor-bikes are home-made being constructed of a bicycle with a washing machine motor attached to self propel it.

"I would appreciate you advising me whether they will be required to purchase a motorcycle tag for these motor-bikes."

It is my opinion that your inquiry must be answered in the affirmative. The license for motorcycle is levied by Code of Alabama, 1940, Title 51, Section 693, which provides in part as follows:

"§693. **License and registration fees; private cars:**—The following license and registration fee shall be charged on automobiles and motor cars kept for private use: *** (g) for each motorcycle—four dollars; (h) for each motorcycle with side car attached—five dollars. Where the motorcycle is acquired or brought into the state on or after January first, or is not used prior to January first, the license shall be—three dollars. Where the motorcycle is acquired or brought into the state after April first, or is not used prior to April first, the license shall be two dollars and fifty cents. Where the motorcycle is acquired or brought into the state after July first, or is not used prior to July first, the license shall be two dollars. Provided, however, that the license tags for such automobile or motorcycle shall remain with such automobile or motorcycle for the remainder of the current tax year, and that before any private automobile or any motorcycle shall be used on any public highway the proper license tag therefor must be procured and securely attached to the rear and front end of the automobile or motorcycle, said tag to be securely attached right side up with the number thereof in an upright position and the numbers thereof plainly visible. *** "

The definition of a motor vehicle as licensed by the above-quoted section is set out in Title 51, Section 692. This section provides in part as follows:

"§692. **Definitions.**—The following words and phrases used in this ar-

ticle shall have the meanings herein ascribed to them:

"(a) 'Motor vehicle': Every vehicle, as herein described which is self-propelled, or which is drawn by a self-propelled vehicle. (b) 'Automobile': Every motor vehicle, as herein defined, except motorcycles. (c) 'Motorcycles': Every motor vehicle designed to travel on not more than two wheels in contact with the ground and not exceeding ten horsepower and not exceeding the weight of five hundred pounds unloaded. *** "

In 42 C. J., **Motor Vehicles**, Section 9, it is said:

"A 'motorcycle' has been defined as a bicycle having motor attached so as to be self-propelled." Citing **Bonds v. State**, 16 Ga. App. 401, 85 S.E. 629.

In the case of **Deardorff v. Continental Life Insurance Co.**, 151 Atl. 814, 301 Pa. 179, a motorcycle was also defined as "a vehicle having a motor attached so as to be self-propelled."

The premises considered, it is my opinion that a motor-bike as described in your inquiry comes within the definition of a motorcycle as defined by Code of 1940, Title 51, Section 692, *supra*.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

December 3, 1942.

Dr. Douglas L. Cannon,
Assistant in Administration,
Department of Public Health,
Capitol.

Public Health—Isolation and quarantine—Venereal Disease—Detention Home—

Public health officer has the authority to isolate and quarantine persons infected with venereal disease in a detention home or institution provided and maintained by the State, and designated by the State Board of Health for the isolation, quarantine and treatment of persons infected with such disease.

Opinion by Assistant Attorney General Flowers.

Dear Sir:

I have your request for official opinion under date of November 4, 1942 which is as follows:

"Plans are in contemplation for the establishment of a detention home at Wetumpka for female persons afflicted with venereal disease. Please advise me if there is authority in law for the commitment of such individuals to an institution of this kind, or if their isolation must be of a purely voluntary nature. If there is no authority in law for commitment against one's will, please let me know if the State Board of Health has authority through rules and regulations to provide for the detention.

"In a consideration of these matters I would respectfully call your attention to Sections 264, 265 and 271, and Subsection 6 of Section 7 of Title 22 of the 1940 Code of Alabama."

It is my opinion that Public Health Officer has the authority to isolate and quarantine persons afflicted with venereal disease, whenever in the judgment of such public health officer such a course is necessary to protect the public health, in a detention home provided by the State for the isolation, quarantine and treatment of persons so infected with disease.

This office has recently rendered two opinions which involve questions similar to the instant inquiry. On November 17, 1942, in an official opinion address to Dr. Douglas L. Cannon, Assistant in Administration, Department of Public Health, Capitol, this office held that a public health officer has the authority to isolate and quarantine persons infected with venereal disease. It was also held that the public health officer has the authority to isolate and quarantine a person who has been in contact with persons afflicted with venereal disease. On August 28, 1942, in an official opinion addressed to Dr. Douglas L. Cannon, Director of County Health Work, Department of Public Health, Montgomery, Alabama, Quarterly Report of Attorney General, Vol. XXVIII, p. 158, this office held that a public health officer has authority to isolate and quarantine a person infected with venereal disease, in a detention hospital provided for the purpose.

Title 22, Section 264 provides, in part, as follows:

"§264. Persons required to be treated.—*** Whenever in the judgment of the county health officer such a course is necessary to protect the public health, persons infected with venereal disease shall be isolated or quarantined. *** "

Under provisions of this statute, together with the provisions of Sections 74, 47, and 268 of Title 22, Code of Alabama, 1940, the opinions referred to above affirm the authority of a public health officer to isolate and quarantine a person afflicted with venereal disease. With these two opinions as authority, together with the statute and cases therein cited, I shall pretermit a lengthy discussion and affirm the foregoing opinions by stating that it is my opinion that a public health officer may isolate and quarantine persons afflicted with venereal disease whenever in the judgment of the public health officer such course is necessary to protect the public health.

The essential question presented by your inquiry is whether the public health officer has the authority to isolate and quarantine persons infected with venereal disease, by confining such persons in a detention home provided by the State for the treatment of persons so infected. It is my opinion that

the public health officer does have such authority.

The Legislature has, by statute, defined venereal disease as a contagious and communicable disease. It is a menace to the national health and welfare. It is an enemy within our own borders and within our own society. If allowed to remain unrestricted and unconfined, it could destroy the manpower of a nation engaged in a total war. Failure to recognize this fact would constitute negligence on the part of our civil authorities. Public attention has been directed to the serious prevalence of venereal disease by the public health service of the United States. It presents a challenge to our government which threatens to subjugate the youth of the nation.

In the case of **Parke et al. v. Bradley, State Treasurer**, 204 Ala. 455, 86 So. 28, the Supreme Court of Alabama, speaking through Somerville, J., had the following to say:

"The prevention of disease and the conservation of health, by all of the means known to modern science, is universally recognized as one of the most important and imperious duties of government, and in the construction of statutes enacted for such a purpose, under the police powers of the state, courts are agreed that great latitude should be allowed to the Legislature in determining the character of such laws, and how, when, and by whom, in their practical administration, they should be applied. *State vs. McCarty*, 5 Ala. App. 212, 59 South. 543, approved in *Ferguson v. Starkey*, 192 Ala. 471, 68 South. 348; 12 R. C. L. 1271, §10, and cases cited."

In the case of **Dowling v. Harden**, 18 Ala. App. 63, 88 So. 217, the Court of Appeals, through Judge Samford, had the following to say:

"Samford, J. (1) The right of the Legislature, under the police power to establish quarantine to prevent the spread of contagion and infection, is too well established by adjudication and grounded in common sense to be questioned or doubted, and governmental agencies, when authorized, may enact and enforce all reasonable ordinances necessary to attain the desired results. To that end persons affected or reasonably suspected of being affected with diseases known to be infectious or contagious may be segregated, or isolated from the public, either in their homes, or in hospitals or camps prepared for that purpose, until such time as that they will cease to be a menace to the public, and prisoners under legal charges of crime may be, when so affected, segregated from their fellows. When so quarantined, they are subject to such reasonable examination as is necessary to satisfy the health authorities that their release will not endanger the public.

"(2) But persons affected with disease are not for that reason criminals, and jails and penitentiaries are not made or designated for their detention. ***

"(3) The health officer, under the facts, was authorized to consider petitioner within the class of those reasonably suspected of being sources of infection, as provided by Section 17, subd. 15, of the Acts 1919, p. 936, and to be dealt with as provided by that section of the act and the act of

1903, *supra*. But neither the one or the other authorized the health officer to confine or order petitioner's confinement in jail. Such confinement would be illegal. *** "

Although the Appellate Courts of Alabama have had occasion to render few decisions affecting the question under consideration, there are some very strong decisions rendered by the Appellate Courts of other states which prove helpful in substantiating the view herein expressed. I shall quote from some of the more outstanding of these decisions.

In the case of *Rock v. Carney*, 216 Mich. 280, 185 N. W. 798, 22 A. L. R. 1178, the court held:

"Our state has not been alone in dealing with the question of the control of venereal diseases. With the advent of the World War and the congregation of a large number of young men in military camps, the necessity of control of venereal diseases forced itself upon the attention of the health officers of other states, and the courts of some of these other states have been called upon to determine the power of such boards in the premises. So far as I have been able to ascertain the following are all the cases dealing with the specific questions of power to examine and quarantine those infected with venereal diseases, which have arisen from this situation: *Wragg v. Griffin*, 185 Iowa, 243, 2 A. L. R. 1327, 170 N. W. 400, 18 N. C. C. A. 76; *Re McGee*, 105 Kan. 574, 8 A. L. R. 831, 185 Pac. 14; *State ex rel McBride v. Superior Ct.* 103 Wash. 409, 174 Pac. 973; *Ex parte Hardcastle*, 84 Tex. Crim. Rep. 463, 2 A. L. R. 1539, 208 S. W. 531; *Ex parte Brooks*, 85 Tex. Crim. Rep. 397, 212 S. W. 956; *Re Johnson*, 40 Cal. App. 242, 180 Pac. 644; *Re Milstead*, 44 Cal. 239, 186 Pac. 170; *Re Travers*, ____ Cal. App. ____, 192 Pac. 454; *Ex parte Shepard*, ____ Cal. App. ____, 195 Pac. 1077; *Dowling v. Harden*, ____ Ala. App. ____, 88 So. 217; *Brown & Manning*, 103 Neb. 540, 172 N. W. 522.

* * *

"An examination of the authorities, a consideration of our own statutes having in mind the rule that they should be liberally construed in order that the aim intended, i. e., the good of the public health, should be attained, leads me irresistibly to the conclusion that we should hold: That the state board of health has validly determined that gonorrhea and syphilis are communicable diseases; that the power exists in the boards of health acting through their respective health officers to quarantine person infected with these diseases either in their homes, or in detention hospitals, such detention to continue so long as the diseases are in their infectious state; and that, subject to what will now be considered, such health officer has the power to make such examination as the nature of the disease requires to determine its presence."

In the case of *Ex parte Company*, *Ex parte Irvin*, 106 Ohio St. 50, 139 N. E. 204, the Supreme Court of Ohio rendered a decision involving a question similar to the one under consideration. In that case the statute provided that it should be the duty of the public health council to make and amend sanitary regulations to be of general application throughout the state. It was provided that such sanitary regulations should be known as the sanitary code. The

public health council promulgated a sanitary code the provisions of which were practically the same as the Alabama statutes relating to the isolation and quarantine of persons afflicted with venereal disease. I quote the language of the court:

"There is perhaps no provision of the federal Constitution that is more overworked than the Fourteenth Amendment. Counsel generally are apparently unanimous in thinking that any judgment or finding as against the client denies such client the equal protection of the laws, or is without due process of law. It has been so many times decided that the Fourteenth Amendment does not limit the states in the proper exercise of police power that citation of authority seems needless. If authority were needed to support the proposition, sufficient would be found in the Slaughter-house Cases, 16 Wall. 36, 21 L. ed. 394, and in *Holden v. Hardy*, 169 U. S. 366, 18 Supreme Court 383, 42 L. Ed. 780 ***.

"The right of the state through the exercise of its police power to subject persons and property to reasonable and proper restraints in order to secure the general comfort, health, and prosperity of the state is no longer open to question. In the American constitutional system the power to establish the necessary police regulations has been left with the several states.

"Quarantine in the sense herein used means detention to the point of preserving the infected person from contact with others. The power to so quarantine in proper case and reasonable way is not open to question. It is exercised by the state and the subdivisions of the state daily. The protection of the health and lives of the public is paramount, and those who by conduct and association contract such disease as makes them a menace to the health and morals of the community must submit to such regulation as will protect the public.

"It is claimed further in behalf of the petitioners that the Legislature is without power to delegate its lawmaking authority. The distinction between power granted to legislate and power granted to administer marks the difference between the contention urged and the true question herein to be considered. It is not now necessary to consider the question of delegated legislative power. It is sufficient that the power of the Legislature to authorize administrative authority on the part of boards of health, and subdivisions of the state, and to authorize the adoption by such instruments of its choice of rules and regulations affecting public health, including the power to detain and quarantine, has been considered and upheld in *People v. Tait*, 261 Ill. 197, 103 N. E. 750; *State v. Normand*, 76 N. H. 541, 85 Atl. 899; Ann. Cas. 191E, 996; *Highland v. Schulte*, 123 Mich. 360, 82 N. W. 62; *City of Taunton v. Taylor*, 116 Mass. 254; *Isenhour v. State*, 157 Ind. 517, 62 N. E. 40, 87 Am. St. Rep. 228; *Blue v. Beach*, 155 Ind. 121, 56 N. E. 89, 50 L. R. A. 64, 80 Am. St. Rep. 195, and *Hengehold v. City of Covington*, 108 Ky. 752, 57 S. W. 495.

"That the Legislature in the exercise of its constitutional authority may lawfully confer on boards of health the power to enact sanitary ordinances having the force of law within the districts over which their jurisdiction extends is not an open question. This power has been repeatedly recognized and affirmed. *Polinsky v. People*, 73 N. Y. 65; *Metro-*

politan Board of Health v. Heister, 37 N. Y. 661; and Health Dept. of City of N. Y. v. Knoll, 70 N. Y. 530.

"In *Ex parte Johnson*, 40 Cal. App. 242, 180 Pac. 644, it was decided:

"The adoption of measures for the protection of the public health is universally conceded to be a valid exercise of the police power of the state, as to which the Legislature is necessarily vested with large discretion, not only in determining what are contagious and infectious diseases, but also in adopting means for preventing the spread thereof. *Black's Const. Law* §108; *Holden v. Hardy*, 169 U. S. 392, 18 Sup. Ct. 383, 42 L. Ed. 780; *State v. Somerville*, 67 Wash. 638, 122 Pac. 324; *State Bd. of Health v. Bd. of Trustees*, 13 Cal. App. 514, 110 Pac. 137. The Legislature, in its discretion having determined the character of the disease in question, has imposed upon the health department of the city the duty, when having knowledge that one is afflicted therewith, of taking the necessary measures to prevent its spread.

"The isolation of one afflicted with a contagious or infectious disease is a reasonable and proper, indeed the usual measure taken to prevent the increase and spread thereof. ***

"Counsel draws a lurid picture of what might result from maladministration of the law by those charged with the duty of enforcing it. The fact that the authority so delegated may, in a given case, be abused, is no legal reason for denying the power to quarantine summarily in a case where grounds therefor concededly exist. *Ex parte Whitley*, 144 Cal. 167, 77 Pac. 879, 1 Ann. Cas. 13; *Brown vs. State*, 59 Wash. 195, 109 Pac. 802. Possible maladministration of the law is no concern of petitioner, unless such administration thereof is shown to have affected her. ***

"Counsel cites no authorities in support of the contention that one afflicted with a contagious disease cannot be subjected to quarantine regulations until it is first judicially established by some proceedings in court that he is so afflicted. Manifestly to uphold such contention would render laws for the protection of the public health nugatory. *State v. Superior Court (Wash.)*, 174 Pac. 973, where the matter is fully considered."

In the case of *Ex parte King* (Cal.), 16 Pac. (2d) 694, it was held:

"The law only requires that there be probable cause to believe that a person held has an infectious disease, which is communicable, in order to justify the authorities in retaining such person in quarantine. The person so held may be detained legally until there is sufficient showing that the probable cause no longer exists."

In the case of *Ex parte Brown, Brown vs. Manning*, (Neb.), 172 N. W. 522, the Supreme Court of Nebraska held that the City of Omaha is authorized to provide for the detention in the detention home in that city of persons "found to be infected with communicable venereal virus," for such reasonable

time as to prevent the danger of communicating such infection to others. It was also held that under such circumstances such persons would not be entitled to writ of habeas corpus for release from such detention.

The Supreme Court of Montana in the case of *Ex parte Caselli*, 204 Pac. 364, held that the Legislature, under its police power, may enact laws authorizing the establishment of quarantine regulations and requiring the detention of persons affected with contagious diseases dangerous to the public health without resort to a preliminary judicial proceeding to determine the character of the disease and the facts constituting the danger to public health. I quote from the decision of the court in this case:

"Under the statute before us the proper health officer may issue his warrant directing the arrest, without notice, of any person reasonably suspected of having a communicable disease, and his detention for the time being and until the existence and character of the disease can be determined; and, in case his course of conduct or condition is such, in the judgment of the health officer, as to render it necessary to protect the public health, to isolate such person until he recovers from the disease or until he may be released without further danger to the public. If, however, after his arrest, such person challenges the right of the authorities to continue his detention, he is entitled to have its legality inquired into upon habeas corpus. The existence of the power of the health officer to detain any one rests upon the existence of the facts making such detention necessary. The law does not deprive any citizen of the right to be heard on this question, but he is not entitled to a hearing in the first instance.

"The detention of persons affected with or suspected of contagious disease in quarantine presents one of the cases where the police power is literally the law of self-defense—a paramount necessity." Freund's Police Power, §446.

"If the contention of counsel for the complainant should be upheld, this law of self-defense—necessity—would be rendered entirely inoperative while the judicial proceeding would be in progress. In my opinion, the Fourteenth Amendment to the Constitution of the United States and sections 6 and 7 of article 3 of the Constitution of the State of Montana, relied on by complainant's counsel, have no application to this class of cases."

In the case of *State ex rel. McBride v. Superior Court for King County* (Wash.), 174 Pac. 973, the Supreme Court of Washington held that it is within the power of the Legislature, in dealing with problems of public health, to make a determination of fact by a properly constituted health officer final and binding on the public as well as upon the courts. In this case the language of the court is as follows:

"Nor is there any legal reason for denying the power to quarantine summarily or to restrain for treatment a citizen or subject because the authority may be abused or the law maladministered in a given case. *Brown v. State*, 59 Wash. 195, 109 Pac. 802; *In re Thompson*, 36 Wash. 377, 78 Pac. 899, 2 Ann. Cas. 149.

"It is settled that laws and ordinances creating boards of health and granting wide powers for the effective and effectual carrying out of the legislative plan for protecting health must be liberally construed, for as Mr. Freund says, in his work on Police Power (section 446):

"The detention of persons affected with or suspected of contagious disease in quarantine presents one of the cases where the police power is literally the law of self-protection and paramount necessity."

"We must credit the Legislature with a consideration of these things.

"The state board of health and the health commissioner of the city of Seattle, 'being the agency created by the legislature to prevent the outbreak and spread of disease, and to remove causes of sickness, the presumption is always in favor of the board of health, and its action will not be interfered with, unless it appear unreasonable or oppressive. The fact that its membership may sometimes be composed of extremists is no reason for denying the power conferred by the Legislature. Nor should we be controlled by the fact that a scientific theory of to-day may be discarded to-morrow. In matters affecting the public health it is the part of reason and common sense to adopt the best scientific thought of the age in which we live. If research and investigation lead to other accepted theories, then we must adopt them. Were the rule otherwise, both the courts and the Legislature would be without a competent guide.' Board of Health of Covington et al. v. Kollman, 156 Ky. 351, 160 S. W. 1052, 49 L. R. A. (N. S.) 354."

The most recent case which I am able to find dealing with the problem at hand is that of *City of Little Rock et al. vs. Smith* (Supreme Court of Arkansas, July 1942), 163 S. W. (2d) 705, where the defendant was ordered quarantined by the City Health Officer in the public health center, maintained by the United States Government in the City of Hot Springs, Arkansas, because she was found to be infected with venereal disease in a communicable stage. The court held:

"This is not a criminal proceeding, but is one in the interest not only of appellee, but of the public. It is a proceeding to compel her to be quarantined, segregated, from the public, to the end that she may be cured of the venereal diseases with which she is infected, and that she may not communicate them to others. When a cure is effected, the authority to detain her is at an end.

"The venereal diseases with which appellee is afflicted have become so wide-spread and so devastating in their effects upon communities where prevalent as to become a public menace. Many cities are now fighting more or less successfully to overcome this menace and to prevent degeneration into a race of cripples, paranoiacs and insane. Camp Joseph T. Robinson, with its 25,000 young men soldiers; Maumelle Ordinance Works and Arkansas Ordinance Plant, each with thousands of workers, men and women, are near the City of Little Rock, and these men and women, as well as our own citizens in the city, are entitled to protection against these dreadful and loathsome diseases. Here the necessity exists which justifies the exercise of the power, and the private

rights of appellee, if any, must yield in the interest of the public security."

In *re McGee et al.*, 105 Kan. 574, 185 P. 14, 8 A. L. R. 831, is a case involving a question quite similar to the one under consideration. The Supreme Court of Kansas in this case wrote the following:

"The rules of the state board of health and the city ordinance are assailed as unreasonable. In this instance only those provisions of the rules of the state board of health and of the city ordinance are involved which relate to isolation of persons who have been examined and have been found to be diseased. Reasonableness of provisions relating to discovery and to examination of suspects need not be determined. It may be observed, however, that while provisions of the latter class cut deeply into private personal right, the subject is one respecting which a mincing policy is not to be tolerated. It affects the public health so intimately and so insidiously, that considerations of delicacy and privacy may not be permitted to thwart measures necessary to avert the public peril. Only those invasions of personal privacy are unlawful which are unreasonable and reasonableness is always relative to gravity of the occasion. Opportunity for abuse of power is no greater than in other fields of governmental activity, and misconduct in the execution of official authority is not to be presumed.

"It is urged that the regulations in question are unreasonable, in that they authorize isolation in remote places beyond the limits of the city in which the petitioners reside. The court knows of no law, or rule of public policy or private right, which requires a person who, for the protection of the public, must be isolated and treated for loathsome communicable disease, to be interned in the locality in which he may reside. It would have been competent for the state board of health to designate a single hospital for the detention of all persons in the state found to be so diseased, and it is entirely reasonable for cities having inadequate facilities, or having no facilities of their own, to take advantage of those provided by state authority."

A careful study convinces me that the overwhelming weight of authority is expressed in the cases hereinabove referred to. Pursuant thereto and in accordance therewith it is my opinion that a public health officer has the authority to isolate and quarantine persons infected with venereal diseases in a detention home or institution provided and maintained by the State and designated by the State Board of Health for the isolation, quarantine and treatment of persons infected with such disease.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

December 7, 1942.

Hon. William W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

Taxation—Payment of redemption money when only part of land is redeemed—Title 51, Section 311, Code of 1940—

When part of land described in a certificate of purchase is redeemed a probate judge may, under Section 311 of Title 51, Code of 1940, require such certificate to be brought in and note thereon the fact that a particular part has been redeemed, and the holder refunded his purchase money, and then return the same to the holder.

Opinion by Assistant Attorney General Mooneyham.

Dear Sir:

I have your request for official opinion of November 24, 1942, which is as follows:

"At a tax sale for State and County taxes two parcels of land, for convenience referred to as Parcel A and Parcel B, were bid in by the City of Montgomery, and a certificate was given to the City of Montgomery, both parcels being included in the one certificate. The holder of a mortgage on Parcel A has redeemed Parcel A, and paid the money for this redemption into Court. The City of Montgomery has been notified of this redemption, and desires to obtain the money paid in as provided by law, but hesitates to surrender the tax certificate as it will then have no certificate to surrender should Parcel B be redeemed, or should it desire a deed to Parcel B after the time for redemption has expired.

"Under the above circumstances will you please give me your opinion as to the procedure to be followed."

In my opinion, the proper procedure to be followed by you under the facts outlined in your inquiry, is not specifically set out in the Code. Sections 249 to 327, of Title 51, Code of 1940, deal generally with the sale of property for taxes and provides the way and manner through which redemptions can be effected by those entitled to exercise such right. The answer to your questions, therefore, must be found in a study of these Code sections in their relationship to each other. Such a study is permissible under that rule of statutory construction which holds that statutes relating to the same subject matter should be construed in *pari materia* so as to produce a harmonious system if possible. **Quarterly Report of Attorney General**, Vol. XXIV, page 150, 18 **Alabama Digest**, Statutes, Key 225.

With this thought in mind, I call your attention to the pertinent Code sections dealing with the sale of lands for taxes and the redemption thereof.

Under Section 266, *supra*, it is the duty of the tax collector, after a tax

sale and a confirmation thereof, to make out and deliver to the purchaser, other than the State, a certificate of purchase, showing among other things, a description of the property sold. In my opinion, a purchaser at a tax sale receives and holds this certificate of purchase for two general purposes. First, if the land is redeemed, he may surrender this to the probate judge and receive an order from him to the county treasurer for his purchase money. This procedure is authorized under Section 311, *supra*, which reads as follows:

"§311. Deposit of redemption money.—If the lands redeemed were bid in by any person other than the state, the redemption money must be deposited by the judge of probate in the county treasury, and there kept separate and apart from the general funds of the county, and the judge of probate shall notify the purchaser of such deposit by mailing notice to the residence or place of business of such purchaser, or to such address as the purchaser may furnish the judge of probate at the time he secured his certificate of purchase; and upon the demand of the purchaser, his legal representative or assignee, and the surrender of the certificate of purchase, the judge of probate must give him an order on the treasury for the same."

Second, if no redemption is made of the lands within three years, he may return the certificate of purchase to the probate judge and receive a deed to the land which is described in said certificate. The authority for this is found in Section 276, *supra*, which reads as follows:

"§276. Deed delivered to purchaser.—After the expiration of three years from the date of the sale of any real estate for taxes, the judge of probate then in office must execute and deliver to the purchaser, other than the state, or person to whom the certificate of purchase has been assigned, upon the return of the certificate and payment of a fee of one dollar to the judge of probate, a deed to each lot or parcel of real estate sold to the purchaser and remaining unredeemed, including therein, if desired by the purchaser, any number of parcels or lots purchased by him at such sale; and such deed shall convey to and vest in the grantee all the right, title, interest, and estate of the person whose duty it was to pay the taxes on such real estate, and the lien and claim of the state and county thereto, but it shall not convey the right, title, or interest of any reversioner or remainderman therein."

It is to be observed that the above section provides that after the expiration of three years, the holder of the certificate of purchase may return the same to the probate judge and in exchange therefor receive a deed to each lot or parcel of land described therein which has not been redeemed. It is clear that the holder of such certificate is not to receive a deed to each lot or parcel described in said certificate but only to those lots or parcels which have not been redeemed. This section so provides because under Section 306, *supra*, when a tax sale includes several different parcels of land there may be redemption of one or more of the parcels included in the tax sale without a redemption of all the parcels included therein.

If, during the three years allowed for redemption, the land described in the certificate of purchase is redeemed the holder thereof may surrender it to the probate judge, and receive an order for his purchase money. It is to be

noticed, that under Section 311, supra, which authorizes this procedure, no mention is made of what should be done if only a part of the land described in the certificate of purchase has been redeemed. Under Section 276, supra, provision is made for deeds to those lots or parcels which have not been redeemed. Certainly the holder of a certificate of purchase would not want to surrender it under Section 311, supra, when only a part of the lands had been redeemed. If he did, he would have nothing to show that he was entitled to his purchase money on the remainder of the property in the event it was redeemed. Likewise after the expiration of three years, allowed for redemption, he would have nothing to show that he was entitled to a deed to those lots or parcels which had not been redeemed as is provided for under Section 276, supra.

It is apparent that something must be read into Section 311, supra, or a construction placed thereon whereby a harmonious field of operation can be given to it.

In the light of what has been said, it is my opinion that when **all** property described in a certificate of purchase has been redeemed the probate judge should require a surrender of the same before giving an order on the county treasurer for the purchase money. If on the other hand, only **a part** of the property described in the certificate of purchase has been redeemed the probate judge should require the certificate to be brought in and he should note thereon that a part of the land described therein has been redeemed, and the holder of the certificate paid his purchase money therefor. After this notation has been made thereon the certificate of purchase should be returned to the holder together with an order on the county treasurer for the amount due him for that part which was redeemed.

Applying this construction of Section 311, supra, to the facts set out in your inquiry, I am of the opinion you should require the city of Montgomery to bring in the certificate of purchase which it holds and you should note thereon that parcel "A" has been redeemed, and an order on the county treasurer given to the city of Montgomery for the amount of the purchase money. This notation should be dated and signed by you as probate judge and the certificate returned to the city.

In an opinion to Hon. W. C. Bragg, County Treasurer, Fayette County, dated May 17, 1940, (Quarterly Report Vol. XIX, page 164) this office held that it was for the security and protection of the probate judge that certificates of purchase should be surrendered in cases where property had been redeemed. It was also held in the same opinion that in the event the certificate of purchase had been lost, the probate judge might protect himself by taking an indemnity bond. Under the facts quoted in your inquiry the procedure herein outlined for you to follow will furnish you full protection. The certificate which you return to the city of Montgomery will show upon its face that parcel "A" has been redeemed and the city refunded its purchase money.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

December 9, 1942.

Hon. Frank M. Stewart,
Executive Secretary,
Alabama State Milk Control Board,
Montgomery, Alabama.

Milk Control Board—Cooperatives—Licenses—Mutual Farming
or Trucking Association—

Mutual Farming or Trucking Associations exempt from license
or privilege fees or tax—

Title 22, Section 215, Code of Alabama, 1940, providing for licenses
to deal in milk not applicable to Dairy Producers' Cooperative organ-
ized pursuant to Title 2, Subdivision 3, Code of Alabama, 1940.

Opinion by Assistant Attorney General Lurie.

Dear Sir:

I have your request for official opinion under date of November 24, 1942,
which is as follows:

"As provided in Section 4 of the Milk Control Act to request legal
opinions from the Attorney General, your opinion is herewith requested
on the following subject:

"Recently seven (7) milk producers operating in the Montgomery
Milk Shed formed a cooperative processing and distributing plant located
in the City of Montgomery. Five of these producers formerly operated
as producer-distributors, producing and distributing their own milk. Two
of these producers operated as wholesale producers, selling their milk to
distributors. All of these seven have made application and secured li-
cense as individuals.

"The new processing and distributing plant which they operate is a
corporation, known as Dairy Producers Cooperative. The question is—
Should this new Dairy Producers Cooperative be required to secure an
additional license to operate as a distributor, as provided in Section 11
of the Milk Control Act?"

I also have copy of the Articles of Incorporation of the Dairy Produc-
ers Cooperative which you have submitted in connection with your inquiry.

In my opinion, the answer to your inquiry is in the negative.

Title 2, Article 9, Subsection 3, Sections 115 to 133, inclusive, of the Code
of Alabama, 1940, provides for the organization, association and/or incorpo-
ration of mutual farming or trucking associations, and the rights, powers,
duties and privilege incident thereto.

Section 116 of said Subdivision 3, supra, provides as follows:

"§116. How association may be formed.—Five or more producers of agricultural products, whether in the State of Alabama or not, who may desire that they, their associates and successors, shall come under this subdivision and enjoy its benefits may enter into articles of association and incorporation which shall set forth the name of the organization, the period of its existence, its domicile, and the purposes for which it was formed, **and that said association is to be organized or operated under this subdivision.** The articles must be subscribed by the incorporators and acknowledged by one of them before an officer authorized by the law of this state to take and certify acknowledgments of deeds and conveyances, and shall be filed in accordance with the provisions of the general corporation law of this state. When so filed the said articles of incorporation, or certified copies thereof, shall be received at all the courts of the state and other places as prima facie evidence of the facts contained herein, and the due incorporation of such association." (Emphasis supplied)

Section 129 of said Subdivision 3, supra, provides as follows:

"Permit fee.—Any corporation or association organized hereunder shall pay to the state the annual permit fee of ten dollars now required by law, and shall pay all ad valorem taxes on its real and personal property, except that all cotton and all other agricultural products which have been raised or produced in the State of Alabama, title to which may be held by such corporation or association in its own right or for the use and benefit of its members, and all goods and articles purchased or acquired by such corporation, whether in or out of the state, for its own use or for the use and benefit of its members for strictly agricultural or farm purposes in this state, shall so long as held by such corporation or association, **be exempt from taxation; nor shall such corporation be liable for any other license or privilege fee or tax for the purpose of engaging in or transacting business, or otherwise, in this state.**" (Emphasis supplied)

Section 130 of said Subdivision 3 provides as follows:

"§130. Definitions.—Producers of agricultural products herein mentioned shall include individual persons, partnerships, associations and corporations who produce such products either directly or as landlords, tenant or sharecropper. Agricultural products as herein defined shall include the products of field, pasture, meadow and garden, and fruits, melons, berries, nuts and vegetables, live stock, poultry and poultry products, **dairy products** and all other things commonly known as agricultural products." (Emphasis supplied)

The Articles of Incorporation of the Dairy Producers Cooperative in the preamble provides the following:

"We, the undersigned, all of whom are residents and citizens of the State of Alabama, engaged in the production of agricultural products, do hereby voluntarily associate ourselves together for the purpose of forming a cooperative marketing association, with capital stock, under the

provisions of the cooperative marketing act of the State of Alabama, as included in the Code of 1940, Article 9, Subdivision 3, on pages 428-435 thereof, in Title 2."

Thus it may be seen that the intent and purpose of this corporation was to come within the sections cited, supra, and was organized for the purpose of conducting and carrying on a cooperative marketing association in accordance with the provisions set out in Title 2, supra.

The Articles of Incorporation submitted herein expressly adhere to and follow the provisions, limitations and restrictions upon such a cooperative as set out and defined in Subdivision 3 of Title 2 of the 1940 Code of Alabama, in reference to dairy products as defined in Section 130, supra.

Section 129, supra, expressly exempts an association or corporation of the kind and character of the Dairy Producers Cooperative from taxation for license or privilege fees, therefore, the license fees as set out in Title 22, Section 215, Code of Alabama, 1940, (Section 11 of Milk Control Act) are not applicable to the instant corporation and the same is exempt therefrom.

I feel it my duty to call to your attention that where such corporation engages in a sale of commodities or merchandise, not the products of the farm, it would exceed the powers granted to it by Title 2, Subdivision 3, supra, and it would not be exempt from the payment of a privilege license to the State and County for the sale of such commodities. Quarterly Report of Attorney General, Vol. XI, page 51.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

December 9, 1942

Hon. William A. Conrad,
Clerk, Circuit Court,
Mobile County,
Mobile, Alabama.

EXECUTIONS—

RIGHTS OF OWNER OF THE JUDGMENT THEREIN AND DUTIES OF THE CLERK TO ISSUE—

1. In the absence of statute to the contrary, the owner of the judgment has complete control and direction of the issuance of the writ of execution.

2. The clerk has no authority to issue an execution under Code

1940, Title 7, Section 508, where the owner of the judgment or his attorney of record has given written directions not to issue unless the written directions are withdrawn.

3. No mandatory duty rests on the clerk to issue execution except under Code 1940, Title 7, Section 508, where it is required during the period after the lapse of ten days and within ninety days from date of rendition of judgment where the court has not directed otherwise or the owner of the judgment has given no written directions not to issue.

4. The issuance of execution in all other cases are under the direction either of the court or owner of the judgment except where execution against the defendant has been returned "no property found" under Code 1940, Title 7, Section 518.

5. The owner of the judgment has full authority to control the execution of the process after it is placed in the hands of the sheriff in the absence of any wrongful abuse of such authority.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for an official opinion, bearing date of November 24, 1942, is as follows:

"On October 23rd, 1942, I issued an execution in case No. 1130—Corinna K. Herndon as Guardian—vs—Home Oil & Export Co. for Judgment \$382.44—Costs \$34.74; and on this day, November 24th, 1942, on said execution the Sheriff made the following return, viz: 'Received 10-24-42 and returned 11-21-42 Without Action By Order of Pltff's Atty. W. H. Holcombe, Sheriff by Kathryn Farmer, D. S.' Also, today I received similar return on execution in case No. 2030—Henry Smith—vs—Leslie Lane.

"Therefore, I respectfully request your Honor's official opinion on the following questions, viz:

"1.—Is it or not my mandatory duty under said return to issue an alias execution for said judgment and costs in the absence of a request from plaintiff or his attorneys?

"2.—Would I or not be liable on my official bond for the amount of the judgment and costs or any part thereof, if I did not issue an alias execution under said return for said judgment and costs in the absence of a request from plaintiff or his attorneys?

"3.—Would it or not be my mandatory duty under said return to issue an execution against the plaintiff for plaintiff's costs?

"4.—Is or not said return tantamount to a return of 'no property of

defendant found'?

"5.—If you should hold that plaintiff's attorney has control over **both** the judgment and costs and that said return is a legal return, how can the clerks collect fees earned by them in cases wherein such returns on executions are made?

"6.—What are the legal forms of return on executions."

A proper answer to your questions requires a statement and consideration of some established principles of law. It is established by a great array of authority dating back to the common law that where a judgment is obtained in the court by a party that party is the owner of the judgment and a process provided by law for its enforcement is for the benefit of the successful party and unless controlled by statute he has complete right and authority to direct or withhold the issuance of the writ of execution or its enforcement after it is placed in the hands of the sheriff, provided there is no wrongful abuse of his authority to direct.

Judge Freeman in his great work on executions states the proposition in this way:

"As the judgment is the property of the plaintiff, he alone, while the property remains his, is entitled to exercise dominion over it. As a writ of execution is the only means by which the property can be made productive, the owner of the property is necessarily the person entitled to call for the writ; to withhold the writ from him is in effect to withhold from him the beneficial enjoyment of his property; and to allow another to call for or to control the writ is to turn the dominion of property over to one who has no right thereto. Of course, ownership over judgments, like ownership over all other kinds of property, may be exercised in person or by duly constituted agents. But as the plaintiff is the only person entitled to the fruits of the judgment, no execution can properly issue except at his instance or that of his attorney or agent." Freeman on Executions, 3rd Edit. 58-59, Section 21.

Corpus Juris lays down the doctrine in this language:

"In the absence of a statutory regulation, the clerk has no authority to issue an execution without the direction of the judgment creditor or his attorney, because the clerk is not a party to the judgment and has no control over it. He has no right to issue an execution of his own motion, such as to collect his fees; or for the benefit or at the suggestion of interested parties, other than the party obtaining the judgment; for, as a general rule no one but plaintiff or his attorney of record has the right to sue out and control an execution, except where it is otherwise provided by statute. A party is not bound by a proceeding under an execution issued without his authority or that of his attorney, even though it is the custom of the clerk to issue execution without such authority." 23 C. J. 364, Section 117.

These principles are fully considered and the authorities sustaining the same are to be found in an opinion out of this office. Quarterly Report, Attor-

ney General, Vol. XXV, pp. 84 et seq. Our Supreme Court has repeatedly accepted and enforced these principles. In *Patton v. Hamner*, 28 Ala. 618, 622, the court held that the plaintiff in the execution has the right to control his own process and, while the duty rests on the sheriff to pursue the mandate of the process, he cannot do so where he has been otherwise instructed by the plaintiff therein or by his attorney.

At an early date our court held that it was competent for a party at whose suit civil process issued to suspend its energy by directing the sheriff not to execute it and that where he was instructed not to execute a fieri facias until further orders, the officer could not claim fees for disobedience of instructions. *The Oswitchee Co. v. Hope*, 5 Ala. 629. See also *Harden v. Walker*, 5 Ala. 86.

Other authorities hold, which seems to be the established law of the land, that the plaintiff may give directions about executing the writ and go so far as to direct that it be held until further orders or he may order its withdrawal altogether. 21 Amer. Juris. 46, Section 80; 21 Amer. Juris. 54, Section 96; 33 C. J. S. 234 and 235, Section 90.

It seems to be a well-settled principle of law that, in the absence of statute, the clerk has no authority to issue an execution without direction from the judgment creditor. 21 Amer. Juris. 35, Section 44. From the foregoing, it is manifest that the general principles herein stated must control unless our statutory enactments on the subject have abrogated or modified these general rules. The legislative enactments of this State dealing with executions and judgments are to be found in Chapter 11, Code 1940, Title 7, Sections 506 et seq. It will be observed that many of these provisions recognize the general principles of law stated in this opinion.

Section 506, supra, authorizes the party in whose favor a judgment is rendered to have an execution issued any time within ten years after the rendition of the judgment. This is in accord with the general rule that, in the absence of a statute, an execution is issuable immediately after entry of the judgment. 21 Amer. Juris. 31-32, Section 35.

At common law executions are required to issue within one year and one day after rendition of the judgment. 21 Amer. Juris. 32, Section 36. Section 506, Title 7 of our Code now under consideration simply extended the time within which the owner of the judgment was entitled to have execution issued while under this section the plaintiff may have execution issued any time within ten years. He must acquire it as the statutory law of this state directs. Section 508 of Title 7 of the Code provides that after the lapse of ten days and within ninety days from the rendition of the judgment or decree the clerk or register must issue execution unless otherwise directed by the judge presiding or by the written direction of the owner of the judgment or his attorney of record. This language shows very clearly that the clerk can issue an execution only after ten days from rendition of the judgment and between that time and sixty days after the issuance of the judgment and it is equally clear that he cannot issue during this period of time if the court has otherwise directed or the owner of the judgment has given written directions not to issue. It is not elsewhere to be found in the statutes on this subject where it is made mandatory on the clerk to take the initiative and issue an execution. His authority is statutory on this subject and authority

to so act must be found in the statute.

As I have shown, said Section 506 authorizes the plaintiff to have execution issued immediately after the rendition of the judgment. So, under this language, he may act within the first ten days (prior to the time the clerk is required to act) but in doing so he must comply with either Section 510 or Section 511 as the facts may require. Both the plaintiff and the clerk may be prevented from having execution issued by the defendant as provided by Section 512 of Title 7.

Section 515 of Title 7 provides that more than one writ of execution may issue at plaintiff's cost though the first execution has not been returned and if a fieri facias has been returned not satisfied, etc. another may be issued. It will be noted that execution may issue, although one is outstanding on which no return has been made and another process may issue where there has been a return showing the execution unsatisfied. This section also shows that the execution must issue at plaintiff's cost. The conclusion is inescapable that the plaintiff initiates the proceedings under this Section 515. Section 506 of Title 7, supra, gives the plaintiff the right to have execution issued at any time during a period of ten years. The plaintiff, as I have shown, is the owner of the judgment and has control of the process to enforce it but this Section 515 under discussion requires him to become liable for the cost, and it is wholly unreasonable to construe this section as authorizing the clerk to take the initiative and issue execution at the plaintiff's cost when the plaintiff has not asked for it or may be objecting to its issuance. Certainly there is nothing in the language of Section 515 that directs the clerk to become the actor in the first instance.

Independently of statute, the plaintiff has a right to have an alias execution issued where the first is unproductive or if satisfaction is not obtained by the original. 33 C. J. S. 226, Section 85 b.

These views are forcibly supported by the case of *Pryer v. Dennis*, 3 Ala. 254. It is significant that under Title 7, Section 606 of the present Code, the clerk is made liable for failure to issue the execution under Section 511, Title 7, within the time prescribed by law. The time prescribed by law for the clerk to issue under this Section 511 is ten days after judgment and sixty days thereafter. Still more impressive is the further provision of said Section 606 of Title 7 that makes the clerk liable for failure to issue execution "on the request of the party interested." Confessedly, this is a recognition that the clerk is made liable for failure to perform two named duties, (1) failure to issue the execution during the period of ten days after judgment until sixty days thereafter and (2) failure to act at the request of the plaintiff made upon him to issue during all other periods of time. It appears that if the clerk is required or authorized to issue an execution on his own initiative in any other instance than that named in Section 508, the Legislature would have fixed a liability upon him for failure to do so under this Section 606. There is one other provision under the statute that provides that the clerk may issue in **his own name** an execution against the plaintiff and that is only for costs created by the plaintiff in obtaining his judgment and this execution can only issue on condition and that condition is when an execution has issued against the defendant and return is made thereon "no property found." (Section 518) This section needs no argument to demonstrate that no execution issues except on the condition named. Our statute prescribes no fixed

form for a return of an execution.

Sections 526 and 527 of Title 7 of the Code deal with the subject. The former prescribes when the sheriff shall make return and that it shall state when he has done in the way of executing the process and the latter section provides that where the process has not been executed or only executed in part the sheriff shall state in his return why it is not executed or only executed in part. The sufficiency and legality of the return are not to be fitted into a strait jacket but it is sufficient if it states facts to show compliance with the mandate. *Cosky v. Haviland Risley Co.*, 13 Ala. 314, 319; *Harden v. Walker*, 5 Ala. 86.

From the foregoing I conclude that your questions numbered 1, 2, 3 and 4 must be answered in the negative.

For answer to your fifth question, your attention is directed to the latter part of the opinion appearing in Quarterly Report, Attorney General, Vol. XXV, page 84, which part of said opinion starts at the top of page 89.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

December 9, 1942.

Hon. W. H. Hubbard,
Judge, City Court,
Jasper, Alabama.

Subject—Improper License Tags.

1. The determination of whether an automobile is a "Motor truck" or a private car within the meaning of the Revenue Laws of the State of Alabama with reference to the proper license for the same is a question of fact.

2. The mere fact that a Plymouth Sedan Car is used by the owner to haul merchandise for sale to individuals does not change the private car character or classification of the same.

Opinion by Assistant Attorney General Moore.

Dear Sir:

Your letter of November 30, 1942, requesting my official opinion is as follows:

"The Highway Patrol arrested a man and made case in my Court,

where the defendant who owned a Plymouth Sedan car, and in which he hauled merchandise for sale to individuals, listed the Sedan car as a One-half Ton Truck, and had issued a H1 Truck License tag by the Judge of Probate.

"The H1 tag cost him more than the regular C tag would have cost him, now the question is whether the defendant can be found guilty of operating a motor vehicle equipped with an improper tag.

"Would you kindly advise me as soon as possible in order that I will be informed as to the law."

The answer to your inquiry of necessity depends upon the facts stated. A question of fact is the basis for the determination of the proper tag or proper license tag. In that connection I refer you to an opinion of this office rendered on March 8, 1941, to Hon. J. A. Johnson, Judge of Probate, DeKalb County, Fort Payne, Alabama, as the same appears in Vol. 22, Page 202, Quarterly Report Attorney General of Alabama, wherein the following appears, to wit:

"In short, the question of whether a wrecker is designed for carrying freight or merchandise is one of fact and the law imposes the duty upon you to determine this fact."

Section 692, Title 51, Code of Alabama 1940, provides, among other things, as follows:

"The following words and phrases used in this article shall have the meaning herein ascribed to them: *** xxx (j) "Motor Truck": Any motor-propelled vehicle designed for carrying freight or merchandise or drawing a semi-trailer truck on not more than two axles and not operated or driven on fixed rails or tracks; but it shall not include self-propelled vehicles equipped primarily for passenger transportation."

I further direct your attention to the opinion of this office to Hon. J. A. Johnson, supra, and its declaration as follows:

"The mere fact that the vehicle is being used for commercial purposes will not, in my opinion, deprive it of its character as a private car."

There are some opinions of this office that are of assistance in the determination of the facts. Reference is made to the opinion of the Attorney General of Alabama rendered on October 28, 1938, to Hon. L. W. Price, Judge of Probate Conecuh County, Evergreen, Alabama, Vol. 13, Quarterly Reports Attorney General of Alabama, page 48, in which I find the following:

"The automobile referred to in your letter has not been taken from the private passenger car class since, in its modified form, it is not designed nor equipped primarily for carrying freight or merchandise but is to be used solely for the transportation of the owner's dogs to and from the chase.

"It is my opinion that the sole question involved is whether or not the automobile in its modified form is designed or used primarily for carrying freight or merchandise."

As to the question of the proper license for trucks and the determination of the facts connected therewith I also call your attention to an opinion of this office rendered on August 23, 1938, to Hon. E. C. Whelan, License Inspector, Jefferson County, Alabama, Birmingham, Alabama, Vol. 12, Quarterly Reports Attorney General of Alabama, July 1, 1938, to September 30, 1938.

In view of the above mentioned opinions I am of the opinion that the Plymouth Sedan car mentioned in your inquiry did not lose its private car character or classification merely because the vehicle was used by the owner thereof to haul merchandise for sale to individuals. That is not the question presented by the above quoted definition of a "Motor truck." The question there presented is the automobile a motor-propelled vehicle designed for varying freight or merchandise or drawing a semi-trailer truck on not more than two axles and not operated or driven on fixed rails or tracks? The answer to that question with reference to the Plymouth Sedan car mentioned in your inquiry is a question of fact and addresses itself to you for determination on a trial of the defendant. The above mentioned opinions are cited herein for the purpose of aiding you in a determination of that question of fact.

The guilt or innocence of the defendant mentioned in your inquiry will turn upon your determination of the above mentioned question of fact.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

December 10, 1942.

Hon. B. P. Singleton,
Chief Examiner of Accounts,
Capitol.

Fees of Sheriff—Responsibility of Clerk—

1. Where the clerk issues execution for costs and leaves out a part of the costs going to the sheriff and, through such negligence or inadvertence of the clerk, the sheriff loses such costs, the clerk is liable for such damages.

2. Where the clerk issues an execution for costs, places it in the hands of the sheriff and the sheriff makes a levy in an attempt to collect the same and, in the meantime, the clerk settles with the defendant in the execution and fails to collect the amount due the sheriff for his services in collecting such execution, such clerk would be liable for the damages caused to the sheriff. On the other hand, if the sheriff had made no effort to collect the same by levy or otherwise, he would be due no costs for collecting and no damage could be claimed by him.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your request for an official opinion bearing date of November 17, 1942, is as follows:

"Please refer to Section 34 of Title 11, 1940 Code, and advise me in answer to the following:

"1. If a Court Clerk makes up an execution for costs and does not include thereon \$1.50 for the Sheriff in case of collection of the costs, turns same over to the Sheriff and the Sheriff subsequently collects the costs from the proper party minus the \$1.50, would the Clerk be liable for the \$1.50 or would the Sheriff be liable?

"2. If a Clerk turns over to a Sheriff an execution for costs, including therein \$1.50 for the Sheriff in case of collection of the costs on the execution, and the party to whom the execution is directed against goes to the Clerk direct and pays him the costs, minus the \$1.50, is the Clerk liable for the \$1.50?"

It is the duty of the Clerk of the circuit court and other courts of like jurisdiction to issue executions for judgment and costs. I call your attention to Title 7, Section 508, Code of 1940, which provides as follows:

"§508. Issue of executions must be signed and tested.—After the lapse of ten days, and within ninety days, from the rendition of a judgment or decree, the clerk or register must issue execution thereon in

favor of the successful party, unless otherwise directed by the court or the judge presiding at the trial of the cause or by the written direction of owners of the judgment or his attorney of record. The writ must be signed by the clerk or register, and tested on the day it is issued."

I further call your attention to Title 7, Section 509, Code of 1940, which provides as follows:

"§509. Bill of costs to accompany the execution.—At the foot, or on some part of the execution, the clerk or register must state, in intelligible words and figures, the several items composing the bill of cost; and without such copy of the bill of costs, the clerk or register issuing the execution forfeits all right to receive any costs in that case."

Thus it may be seen that it is the clerk's duty to issue executions on all judgments including costs, and to making itemized statement of such costs which must be attached to the execution, therefore, it is my opinion that if the clerk fails so to do and any other officer loses his costs or any item thereof on account of such failure of the clerk to include such or any other item of costs in the execution, the clerk will be liable for same. Title 41, Section 50, Subdivision 3, Code of 1940.

My answer to your second inquiry is conditionally in the negative. The condition being, that, if at the time of the settlement the sheriff has either levied on property for the purpose of enforcing collection or had called upon the defendant in execution in attempting to collect same, then in such event the sheriff would be entitled to the fee of \$1.50, and if the clerk had failed to collect said fee, he would be liable therefor. If, however, the sheriff has simply received said execution and had made no effort to collect same, he would not be entitled to this fee and no liability would attach on the part of the clerk on failure to collect same. I call your attention to Title 11, Section 34, Code of 1940, which reads in pertinent part as follows:

"Fees allowed to sheriffs *** Collecting execution for cost only\$1.50."

You will note the above section says "collecting executions" and not "receiving executions." I also call to your attention Title 11, Section 4, Code of Alabama, 1940, which reads as follows:

"§4. When fees due.—Fees allowed by law are due only at the termination of the suit, except that fees for transcripts of papers filed in the cause, other than copies of bills, to which parties are entitled as of course, are due when service is performed; and no fee, except for final record, shall be demanded or received in any case unless the service has been performed."

You will note the above winds up with the expression "and no fee, except for final record, shall be demanded or received in any case unless the service has been performed."

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

December 10, 1942.

Hon. O. C. Maner, Clerk,
Court of Common Pleas,
Montgomery County,
Montgomery, Alabama.

Clerk of Inferior Court—Montgomery County—Fees and Costs—

Under facts stated, fee fixed by Section 38, Title 11, Code 1940, is not chargeable.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your request for an official opinion bearing date of December 7, 1942, is as follows:

"Under Section 33 of the Act creating the Court of Common Pleas of Montgomery (Local Acts, 1939, Page 87), it is provided 'that the same fees and costs that are charged now or hereafter allowed to Justices of the Peace in all civil and criminal cases, shall be taxed and collected by the clerk.'

"Under Title 11, Section 38 of the Code of Alabama, fixing fees of the Justices of the Peace, it is provided that '**Summons and Proceedings thereon to judgment**, if judgment be for less than \$50.00, 50 cents, same services if judgment be for more than \$50.00, \$1.00.'

"Please let me know if the Summons and Complaint is issued and returned by the Sheriff, 'not found,' whether I must make a charge against the plaintiff, and what should this charge be?

"This office is on a Salary basis."

It is my opinion you cannot make such a charge against the plaintiff or anyone else under the facts you state. In the first place, you cannot determine just what the costs would be.

The act creating the Inferior Court or Court of Common Pleas for Montgomery County (Local Acts 1939, page 87) by Section 33 of said act provides as follows:

"Section 33. That the same fees and costs that are now or may hereafter be allowed by law to justices of the peace in all civil and criminal cases shall be taxed and collected by the clerk in such cases in said court in the same manner as is now or may hereafter be provided by law for taxing and collecting costs in the courts of justices of the peace in this state, and when collected shall be paid by the clerk of said court once a month into the treasury of said county."

You will note the above section provides that in the Inferior Court or Court of Common Pleas for the County of Montgomery, the same fees and costs are chargeable as are now provided by law for taxing and collecting costs in the courts of justices of the peace in said state.

The above being true, we have to look to the general law for fees of justices of the peace. The schedule of fees provided for justices of the peace is found under Title 11, Section 38, Code 1940, and among these fees we find the following provided:

"Summons and proceedings thereon to judgment, if judgment
be for less than fifty dollars 50

Same service if judgment be for more than fifty dollars \$1.00"

Therefore, there is no way to determine this fee until there is a judgment by default or judgment after trial on issue joined and it goes without saying there can be no judgment of any kind unless the defendant is brought into court by service of summons and certainly up to this point the only cost that could accrue would be the issuing of the summons by the clerk.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

December 11, 1942.

Miss Grace Ward,
Clerk, Circuit Court,
Bibb County,
Centreville, Alabama.

Clerk—Fee for Making Transcript—

Clerk of the circuit court is entitled to fifteen cents per one hundred words for making and certifying the transcript, which is paid by the Department of Corrections and Institutions, in any case where the defendant is sentenced to the penitentiary or to hard labor for the county.

Opinion by Assistant Attorney General Haynes.

Dear Madam:

Your request for an official opinion bearing date of December 3, 1942, is as follows:

"Would like to have your opinion on the following matter:

"In 1939 a defendant in this Court plead guilty to the offense of Perjury and at the same time was placed on Probation for a period of 3 years. In 1939 the costs in this case was paid by the State to the Former Clerk. In 1942 this defendant's probation was revoked and cancelled and the order of revocation and cancellation was sent to me with instructions to make out a transcript and mail to Department of Corrections and Institutions.

"What I would like to know is this. Are there any fees due me in connection with this case? If so, how are they to be collected? This defendant is already in prison on another charge on which cause his probation was revoked and cancelled."

It is my opinion you are entitled to pay at the rate of fifteen cents per one hundred words for making the transcript, which you are required to furnish the Department of Corrections and Institutions, where a defendant is sentenced to the penitentiary or to hard labor for the county.

According to your statement of facts, your predecessor could not have collected this fee or allowance as during his term of office the defendant was never sent to the penitentiary or sentenced to hard labor but was on probation.

This fee is provided for by Title 11, Section 89, which sets out the schedule of fees and allowances of the clerk of the circuit court in criminal cases and is as follows:

"For making transcript and certificate, for each 100 words15"

This fee is paid by the Department of Corrections and Institutions as other fees in criminal cases are paid where the defendant is sentenced to the penitentiary or to hard labor for the county.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

December 11, 1942.

Hon. R. E. King,
Tax Collector,
Mobile County,
Mobile, Alabama.

Taxation—Code 1940, Tit. 51, §§ 4, 5, 8—Exemptions—Manufacturing Plants—Abandonment of Operation—Forfeiture of Exemption—Tax Collector—

1. Where county governing body grants exemption from taxation pursuant to Code 1940, Tit. 51, §4, only such governing body is authorized thereafter to ascertain and establish the fact of forfeiture of such exemption, or "cessation" thereof as provided in Code 1940, Tit. 51, §5.

2. Until exemption is thus cancelled or denied or withdrawn by the county governing body the Tax Collector in the collection of taxes should recognize the exemption.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion of December 2, 1942, is as follows:

"On June 4th, 1941, the Mobile County Board of Revenue and Road Commissioners granted a ten year exemption of County taxes, but not School taxes, to the Southern Furniture Manufacturing Co., who proposed to manufacture and assemble furniture, furniture parts and wood and metal products of all descriptions.

"In December of 1941, this Company through its proper officer, made an assessment for the 1942 taxes consisting of \$3500.00 on the land and \$75,000.00 on the building, which I understand was completed in February, 1942. The Company claims that it is entitled to the exemption on the building, as granted by the Revenue and Road Commissioner.

"The writer has refused to grant this exemption on the ground that the Company has never operated and basing his contention on paragraph 8, Title 51, of the Code of 1940. This building has been occupied by the United States Government since the early part of 1942.

"Please advise the writer as soon as possible if this Company is entitled to the exemption or if the writer is correct in his contention. Also please advise me if this request will waive any penalty that may accrue if you are unable to render me the opinion in time for them to pay the taxes by December 31st, 1942.

"I am sending Mr. C. M. A. Rogers, the Company's Attorney, a copy of this letter."

The exemption applied for and granted must be evidenced by some order "entered on the minutes" of the governing body granting the same, "designating the time which such exemption shall expire." Code 1940, Tit. 51, §4.

In Section 5 of said Title 51 it is provided that the exemption "shall cease whenever the operation of such factory or plant for the purposes of its construction shall be abandoned," and that "where such plant is not operated for a consecutive period of twelve months, (sic) such fact shall be *prima facie* evidence of such abandonment."

Said Section 5, however, is silent as to the method by which such abandonment shall be ascertained or determined or by whom or what body such determination shall be made or how the same shall be evidenced of record. The very fact that the statute makes non-operation "*prima facie* evidence of such abandonment" implies a legislative intent, however, vaguely indicated, that some hearing or investigation should be made, by some appropriate body or official, with a view to establishing of record the fact of abandonment and consequent waiver or termination of the exemption based on non-operation of the plant or factory "for the purpose of its construction,"—which, upon a fair construction of said section 5 in its entirety must continue "for a consecutive period of twelve months," (or a period of twelve consecutive months), before the *prima facie* presumption of abandonment and consequent forfeiture can arise.

Inasmuch as the power to grant exemption is vested in the county governing body, as to county taxes, and in the Department of Revenue as to State taxes (Code 1940, Tit. 51, §7) and grant of exemption and the term thereof must be evidenced on their minutes or records, it is only logical to hold in the absence of express statutory provision to the contrary that any forfeiture or waiver of the exemption so granted must likewise be a matter of record and should be ascertained by the body or authority by which exemption was granted.

In other words I am unable to find any authority whereby the Tax Collector or any officer or agency other than the county governing body or the Department of Revenue, as the case may be, may ascertain or declare the fact of abandonment, waiver or forfeiture of exemption.

I am of opinion therefore that unless and until the county governing body of your county itself acts to withdraw or cancel the exemption which it has granted you should be guided by the tax assessor's records in the matter of collecting taxes assessed against the instant taxpayer, Southern Furniture Manufacturing Company. In short, I am of opinion that you as Tax Collector are not authorized to vacate or annul the grant of exemption heretofore made by your county governing body as the same appears of record in the minutes of its meetings.

This conclusion makes it unnecessary to answer your remaining questions. In conclusion also it may be stated that your inquiry involves a mixed question of law and fact which the governing body only, in my opinion, is authorized to determine by an appropriate order or resolution entered on its minutes after due investigation and consideration.

"(3) Is he required to keep a final record?"

"(4) Does this section require (a) the keeping of a trial docket in which all cases brought into court be entered in numerical order on sheets prepared for that purpose, and (b) does it require the clerk to enter on said sheet, all actions taken by the court such as orders of continuance, forfeitures, dismissals, not guilty, or guilty and amount of fine assessed, and (c) if fine and cost assessed and are not presently paid and no confession of judgment therefor, does it require order of sentence for statutory number of days for fine?"

"(5) Should all orders necessary to be entered on the trial docket be signed by the Judge with his name or initials?"

"(6) If the Judge does not sign or initial the orders and judgments entered on the dockets, should he sign the daily minutes (in the event same are required to be kept)?"

"(7) If a defendant has been tried, found guilty and sentence duly recorded against him, how many days pass after such sentence has been recorded in which the Judge may set aside such judgment and sentence and enter a different judgment?"

In answer to your letter I shall pretermit answering each question pertaining to the records of the Inferior Criminal Court of Mobile separately, but I shall give you my opinion as to what records are affirmatively required to be kept by the clerk of said court.

The Inferior Criminal Court of Mobile is a creature of a local act. The duties of the clerk in connection with the records of the court are governed entirely by the provisions of the local act as amended. Section 4 of Act No. 66, S. 116, approved February 21, 1907, Local Acts of Alabama, 1907, p. 82, which said section amended Section 6 of Act No. 558, H. 552, approved February 23, 1899, Local Acts of Alabama, 1888-89, page 1164, provides in part as follows:

" *** The duty of said clerk shall be to keep a record of all the proceedings of said court; he shall keep in a book to be furnished by the Board of Revenue and Road Commissioners of Mobile County a properly arranged docket of all cases tried in said court and all examinations had therein, which docket shall set forth the nature of the case, the date of the issue and return of the process and a statement of the judgment returned in the case sufficient to clearly show what was done in the case, together with an itemized copy of the bill of costs, and by whom paid."

This is the only provision of the local act as amended which defines the duty of the clerk of the court in connection with the keeping of records.

A careful study of the law involved and particularly the above quoted excerpt leads me to the opinion that the Clerk of the Inferior Criminal Court of Mobile is required to keep in one and only one "book to be furnished by the Board of Revenue and Road Commissioners of Mobile County a properly ar-

Section 8, Tit. 51 (referred to in your letter as paragraph 8) is not material to the instant inquiry. It deals with State taxes as to which only the Department of Revenue is authorized to grant exemption, and lays down a rule for guidance of that department only.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

December 15, 1942.

Hon. B. P. Singleton,
Chief Examiner of Accounts,
Department of Finance,
Capitol.

Inferior Criminal Court of Mobile—Records—

Records required to be kept by the Clerk of Inferior Criminal Court of Mobile—

Court required to make order of sentence for statutory number of days for the fine, when fine and costs are not presently paid and there is no confession of judgment therefor—

Judge of said court not required to sign or initial record entries made by clerk.

Court loses jurisdiction to set aside its judgment after the expiration of five days.

Opinion by Assistant Attorney General Flowers.

Dear Sir:

I have your request for official opinion under date of October 29, 1942, which is as follows:

"Please refer to Acts 1898-99 at page 1164 and Local Act of 1907 at page 82 particularly Sections 7 and 12 (amended by Local Act 1907, page 82), and kindly advise me in answer to the following questions:

"(1) As the Inferior Criminal Court of Mobile is a Court of Record, with seal, what records are required to be kept?

"(2) Does Section 6 require the clerk to keep a daily minutes of all proceedings of this court?

ranged docket of all cases tried." In other words, he is required to keep only one book, which book shall serve as a trial docket and shall contain the following information: 1. A record of all of the proceedings of the said court. 2. A properly arranged docket of all cases tried and all examinations had therein. 3. The nature of the case. 4. The date of issuance and return of all processes. 5. A statement of the judgment returned in the case sufficient to clearly show what was done in the case. 6. An itemized copy of the bill of costs, and by whom paid.

It is my opinion that if fine and costs are assessed and are not presently paid, and there is no confession of judgment therefor the judge must make an order of sentence for the statutory number of days for the fine. This is as it would be in any other court.

I find nothing in the local act creating this court which requires the Judge of the Court to sign or initial the entries made in the book which the clerk is required to keep. It is therefore my opinion that the judge's signature or initials are not necessary.

Section 3 of Act No. 66, S. 116, approved February 21, 1907, Local Acts of Alabama, 1907, p. 82, which said Section amended Section 5 of Act No. 558, H. 522, approved February 23, 1899, Local Acts of Alabama, 1888-89, page 1164, provides in part as follows:

"From any judgment of this Court defendants shall have the right to appeal to the city court of Mobile under the same regulations and requirements as now govern appeals from **Courts of Justices of the Peace.**" (Emphasis supplied)

Title 13 Section 477, Code of Alabama, 1940, which governs appeals from judgments before Justices of the Peace or Courts of like jurisdiction provides as follows:

"§477. Appeals from judgments before justices or courts of like jurisdiction.—Any party may appeal from any judgment rendered against him before a justice of the peace or court of like jurisdiction to the circuit court, or court of like jurisdiction, upon complying with the provisions of this chapter at any time within five days after the rendition thereof, unless otherwise provided in this Code."

In view of the two quotations immediately above, it is my opinion that the Judge of the Inferior Criminal Court of Mobile loses jurisdiction over his judgment after the expiration of five days. And, in answer to your question numbered 7 it follows that the judge of said court may not set aside any judgment and sentence rendered by him after the expiration of five days from the date of rendition.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

December 15, 1942.

Hon. C. H. Albritton,
Judge of Probate,
Wilcox County,
Camden, Alabama.

Wilcox County—Local Act, 1939, p. 261—

Contract between Wilcox County and Watkins, Morrow & Co. for services of latter in effecting exchange of Wilcox County's refunding bonds for its outstanding bonds not within Local Act No. 436, S. 397, approved Sept. 13, 1939, §13, requiring letting of contracts only after bona fide competitive bids have been submitted after advertisement for such bids.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion bearing date of November 25, 1942, is as follows:

"On the 28th day of October, 1942, Wilcox County through its then Probate Judge and the Court of County Commissioners entered into a contract or agreement with Watkins, Morrow & Co., a partnership, whereby said Wilcox County agrees to authorize an issue of \$200,000 par value New Refunding Bonds to be dated November 1, 1942, and to mature annually until the year 1972. Said Watkins, Morrow & Co. agrees that said New Refunding Bonds are to bear interest at the rate of 5% until maturity of certain bonds now outstanding and 3% per annum thereafter until maturity.

"Said contract further stipulates, among other things, that Wilcox County will pay Watkins, Morrow & Co. for services and expenses in connection herewith the sum equal to 2% of par value of said New Refunding Bonds and said Wilcox County also agrees to pay all expenses in connection with such refunding including legal opinion of nationally known attorneys, etc.

"Please give us your opinion according to the facts set out in paragraph 1 herein above as to whether or not this contract violates Section 12 of the Henderson Act No. 397, Local Acts of 1939.

"Please give us your opinion according to the facts set out herein above in paragraph 2 as to whether or not we violate section 13 of the Henderson Act No. 397, Local Acts of 1939.

"Please advise us as to whether or not this agreement violates any part of the Henderson Act No. 397, Local Acts of 1939. For your further information I beg to advise that there has been no advertisement for bids in regard to New Refunding Bonds or as to the contract with said Watkins, Morrow & Co. for the payment of Commission, expenses, etc.

"The aforesaid contract has been executed but is being held up pending your opinion, therefore we will thank you to give this your immediate attention."

Counties are authorized to refund bonded debt by issue of refunding bonds, subject to the provisions of Code 1940, Tit. 37, §§254-273. Code 1940, Tit. 12, §§104, 109.

Code 1940, Tit. 37, §259, after providing for notice of sale of bonds (including county bonds, of course), expressly provides:

" *** nothing herein contained shall prevent the issue of funding or refunding bonds in exchange for a like or greater amount of the interest then due or accrued on or the principal of indebtedness to be funded or refunded thereby *** with the consent of the holders of such indebtedness to be exchanged without the publication of notice or other advertisement; provided, however, that not more than five per cent of the face value of funding or refunding bonds so exchanged shall be paid for making or securing the making of such exchange."

The foregoing, in my opinion, is express authority for the refunding operation contemplated by the contract with Watkins, Morrow & Co. above referred to. The remaining question is whether in the negotiation of such contract, the county was required by Act No. 436, S. 397, approved Sept. 13, 1939 (Local Acts 1939, p. 261) to comply with Section 13 thereof (p. 268) requiring the county to advertise for bids preliminary to execution of contracts therein referred to.

Section 12 of said Act expressly provides that as to sales of "bonds, warrants, or other property," the county must advertise for bids, and sell, "only after bona fide competitive bids have been submitted." No provision is made in said Section 12 for exchange of bonds as contemplated in Code 1940, Tit. 37, §259, supra.

To what extent, then, does the succeeding Section 13 affect the question? This turns upon the construction to be given the word "contracts" therein. The contract under consideration with Watkins, Morrow & Co. cannot be said to be for sale or purchase of bonds, warrants or other property. It is a contract for their **personal services**, based no doubt on consideration of that firm's personal fitness or ability to do the work contemplated thereby.

Said Section 13 evidently refers only to such contracts as the "State Department of Finance or the State Highway Department or other State agency now or hereafter authorized by law," is authorized to make, and contemplates "purchases," or contracts of purchase and sale within the ordinary meaning of those terms; must be limited, or restricted, in my opinion, to contracts for purchase of personal property; and should not be extended to contracts for personal services, as to which the personal element enters to such an extent as not to call for competitive bidding.

Under the local act the county may avail itself of the services of the designated State agencies and departments, or may act on its own initiative as

it deems best. This alternative choice of action would seem to apply, and to be restricted, to such contracts only as said agencies and departments are authorized by law to make in behalf of counties.

As to the Department of Finance, its authority so far as I can ascertain, with reference to contracting in behalf of counties is: "When requested by any county *** to make such purchases, contracts or leases for it," as are referred to in Code 1940, Tit. 55, §108, viz: "all purchases of furniture, fixtures, supplies, material, equipment and other **personal property except printing** *** the purchase, contract or lease price of which is one hundred dollars or more," —as to which the county is required to make "periodic" reports. Code 1940, Tit. 55, §108.

The State Highway Department, so far as I can ascertain, is not authorized to bind the counties by contract, whether for purchase of road materials and equipment, or otherwise. Certainly said department has no authority with respect to the issue, sale or exchange of county bonds.

I conclude therefore that the contract you refer to between Wilcox County and Watkins, Morrow & Co. for their services in and about the county's refunding operations by exchange of refunding bonds for its outstanding bonds, as authorized by general law, (Code 1940, Tit. 12, §104; Tit. 37, §259) is not within the purview of Local Act No. 436, approved Sept. 13, 1939, supra, Section 13 (Local Acts 1939, pp. 261, 268).

This conclusion is based largely upon the distinction between sale and exchange of refunding bonds as drawn and contemplated by general law, (Code 1940, Tit. 37, §259, supra).

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

December 17, 1942.

Mrs. Pearl R. Reeves,
Acting Sheriff,
Pike County,
Troy, Alabama.

1. Under Section 3 of Act No. 2, General Acts of Alabama 1942, approved November 20, 1942, it is optional with the elected or appointed official as to whether he advises, in writing, appointing authority that he has or will enter the military service of the United States and desires to avail himself of the privileges and immunity granted by the Act. A failure to do so would not vacate the office.

2. The appointing power cannot forestall the rights and prerogatives of its own successor to officers whose official terms expire contemporaneously with or after the expiration of the term of the appointing power.

Opinion by Assistant Attorney General Moore.

Dear Madam:

I have your request for official opinion under date of December 8, 1942, which is as follows:

"I would appreciate it very much if you will give me your official opinion as soon as possible on the following questions. On Nov. 30 I was appointed as temporary acting sheriff under the provisions of act number two passed by the recent special session of the legislature to take the place of my son Ben Reeves who was duly elected sheriff of Pike County in the November election, but who is now a member of the armed forces.

"1. Will it be necessary for Ben Reeves to notify Governor elect Sparks that he is in the armed forces and wishes to avail himself of the privileges of the above referred to act after Governor elect Sparks has taken the oath of office as Governor of Alabama?

"2. Does my present appointment under act number two hold good, especially under section six of the above referred to act for such time as Ben Reeves is in the armed forces of the United States, or is it necessary for me to receive an appointment under the incoming Governor to continue as acting sheriff of Pike County, Alabama?

"I would appreciate very much your giving me your official opinion on this as soon as possible as time is short."

In answer to the first question propounded by you I refer you to Section 3, of Act No. 2, General Acts of Alabama 1942, approved November 20, 1942, as follows:

"Section 3. That officer or board who now has the power to appoint

to vacancies in such office upon being advised in writing by an elected or appointed official of any county in the State of Alabama that such official has or will, enter the military service of the United States, and desires to avail himself of the privileges and immunity granted by this act, or upon failure of such official to so advise the appointing authority for a period of thirty days after his entry into the military service, shall have the power subject to the application and limitation of any Civil Service or Merit law under which any said county may be operating to appoint a temporary acting official who shall be clothed with all the powers, privileges, and duties regularly exercised by the official in whose place he is acting. Such temporary acting official shall receive the same compensation, payable in the same manner and from the same source as the official in whose place he is serving."

In view of the above Section of said Act it is optional with the elected or appointed official as to whether he advises, in writing, the officer or board who has the power to appoint to vacancies in such offices that he has or will enter the military service of the United States and desires to avail himself of the privileges and immunity granted by the Act. A failure to do so would not vacate the office. Such failure of such official to so advise the appointing authority for a period of thirty days after his entry into the military service would vest in the appointing authority the power to appoint a temporary acting official.

However, it is the opinion of this office that the most acceptable procedure would be had by the elected or appointed official advising the appointing authority, in writing, that he has or will enter the military service of the United States and desires to avail himself of the privileges and immunity granted by said Act. That, however, is not a legal necessity, but does comply with the requirements of the Act.

Your second question and the answer thereto calls for a consideration of the provisions of the Constitution and Statutes of the State of Alabama with reference to the term of office of the Governor of Alabama and the Sheriff of a county in the State of Alabama. We first direct our attention to the term of office of the Governor of Alabama.

Section 116 of the Constitution of Alabama provides:

"The governor, lieutenant-governor, attorney general, state auditor, secretary of state, state treasurer, superintendent of education and commissioner of agriculture and industries, elected after the ratification of this constitution, shall hold their respective offices for the term of four years from the first Monday after the second Tuesday in January next succeeding their election, and until their successors shall be elected and qualified. After the first election under this constitution no one of said officers shall be eligible as his own successor; and the governor shall not be eligible to election or appointment to any office under this State, or to the senate of the United States during his term, and within one year after the expiration thereof."

In the construction of that section of the Constitution the Supreme Court of Alabama in the case of *Oberhaus v. State ex rel. McNamara*, 173 Ala. 483,

55 So. 898, contains a discussion of the meaning of the expression, "from the first Monday," as used in said section and then declared that the term of the Governor begins on Tuesday following the first Monday after the second Tuesday in January next succeeding his election. In that connection we quote from that decision, to wit:

"Upon a full consideration of the arguments in favor of each of these views, and regardful of the force of the general rules of construction, we are of the opinion that section 116 of the Constitution, read in connection with sections 48 and 115, must be construed as fixing the terms of the Governor and other State officers therein named as beginning on Tuesday, and as not including the Monday from which the terms begin to run; and that the meaning is too plain to permit of alteration by legislative enactment or popular usage.

We now turn our attention to the laws relating to the beginning and ending of term of office of the Sheriff of a county in Alabama. Section 138 of Article 5, of the Constitution of Alabama, as amended by Amendment No. 35, provides, among other things, as follows:

"Section 138 of Article 5.—A sheriff shall be elected in each County by the qualified electors thereof who shall hold office for a term of four years unless sooner removed, and he shall be eligible to such office as his own successor ***."

Section 18 of Title 41, Code of Alabama 1940, provides:

"§ 18. (2569) (1464) (3055) Terms of office of county officers.—The sheriff, one coroner, county commissioners, or members of board of revenue, or boards or courts of like jurisdiction, one county treasurer, when elective, two justices of the peace, and one constable for each election precinct, shall hold their respective offices for the term of four years from the first Monday after the second Tuesday of January next after their election, and until their successors are elected and qualified."

In our determination of the date of beginning and ending of the term of office of the sheriff we must come to the same conclusion that the Supreme Court of Alabama did with reference to the term of the Governor in the case of *Oberhaus v. State ex rel. McNamara*, supra, as the language employed in section 18 of Title 41, Code of Alabama 1940, stating the term of the sheriff is the same as section 116 of the Constitution of Alabama defining the term of the Governor of the State.

The term of office of the Governor of Alabama and a sheriff of a county in Alabama begins and ends contemporaneously. Having reached that conclusion we are presented with the question of whether Governor Dixon, the present Governor of Alabama, whose term of office will end at midnight of the first Monday after the second Tuesday in January, 1943, is the proper appointing authority to appoint a temporary acting sheriff of Pike County, Alabama, under the provisions of the Act in question, for the term to which Ben Reeves was elected in November, 1942, which term will begin on Tuesday following the first Monday after the second Tuesday in January, 1943, or will

Governor Elect Sparks be the proper appointing authority to make such appointment after his inauguration and installation as Governor of Alabama for the term beginning on Tuesday following the first Monday after the second Tuesday in January, 1943? That question is clearly answered by the Supreme Court of Alabama in the case of *Oberhaus v. State ex rel. McNamara*, supra, in the following language, to wit:

"We have carefully examined the authorities on this proposition, and, as there is no material conflict among them, it is not necessary to here reproduce their language or reasoning. They clearly settle the law to the effect that the appointing power cannot forestall the rights and prerogatives of its own successor by appointing successors to officers whose official terms expire contemporaneously with or after the expiration of the term of the appointing power."

In view of the above I am of the opinion that Governor Sparks will be the proper appointing authority to make the appointment of a temporary acting Sheriff of Pike County, Alabama, for the term beginning on Tuesday following the first Monday after the second Tuesday in January, 1943, to which your son, Ben Reeves, was elected in November, 1942. That being true it necessarily follows that your present appointment, having been made on November 30, 1942, is for the remaining portion of the present term of the Sheriff of Pike County, Alabama, which expires at midnight of the first Monday after the second Tuesday in January, 1943, and having been made by Governor Dixon does not continue into a term that does not begin until after the expiration of the term of office of Governor Dixon.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

December 18, 1942.

Hon. Roy Johnson,
Tax Assessor, Jefferson County,
Bessemer Division,
Bessemer, Alabama.

Attention: Mr. J. E. McAdory, Deputy.

Homestead Exemption

1. The taxpayer redeeming lands in the month of August from prior tax sale wherein the State was the purchaser does not have such title and occupancy as will support a homestead exemption for the then current year.

Opinion by Assistant Attorney General Moore.

Dear Sir:

Your request for my official opinion bearing date of October 23, 1942, is as follows:

"The opinion to the Hon. S. E. Boozer does not answer my question. I am requesting that my request for an official opinion be rendered. I will re-state my request.

"In 1932 Mr. A assesses his property regularly. Sometime in 1933 the tax collector advertised and sold Mr. A's property regularly for its taxes. In August 1942 Mr. A makes application to the Judge of Probate to redeem this property and the Judge of Probate charges Mr. A the taxes to September 30, 1941, inclusive. This leaves the tax year of 1942 to be charged to Mr. A by the tax assessor. When Mr. A redeems the property from the Probate Judge he goes to the tax assessor and asserts his rights in assessing the property and claiming homestead exemption for the tax year of 1942. This is the only time that Mr. A could claim homestead exemption as the title was in the hands of the State until it was redeemed and the title reverted back as of October first, 1941, as the tax assessor makes his charge as of that date. My question is: Is this a legal claim for homestead exemption for tax year 1942?"

In answer to your inquiry I first call your attention to an opinion of this office as the same appears in Quarterly Report Vol. VIII, Page 285. In that opinion I find the following expression, pertinent to the issue here involved, to wit:

"The homestead exemption act refers for a definition of 'homestead' as defined by the Constitution and laws of the State of Alabama. The homestead exemption as defined by the Constitution of the State of Alabama is, 'Every homestead not exceeding eighty acres and the dwelling and appurtenances thereon, to be selected by the owner thereof, and not in any city, town or village, or in lieu thereof, at the option of the owner, any lot in a city, town or village, with a dwelling and appurtenances

thereon, owned and occupied by any resident of this state and not exceeding the value of \$2,000.00."

It is to be noted that the Legislature has extended the size of the homestead to 160 acres without affecting the attributes of ownership and occupancy as stated by the Constitution.

Title 7, Section 625, Code of Alabama, 1940.

The words "Owned and Occupied" qualify and limit the application of the homestead exemption act to property owned and occupied in fact by the taxpayer.

Next I call your attention to an opinion of this office to Hon. S. E. Boozer, Judge of Probate of Calhoun County, Alabama, on March 7, 1941, (Quarterly Report of Attorney General, Vol. XXII, Page 187, Jan. 1, 1941, to March 31, 1941.) In that opinion it was held that where lands had been purchased by the State at a tax sale and redemption is sought by the former owner he was not entitled to a homestead exemption during the time that the State owned the same. In that connection I quote from that opinion:

"In my opinion since the lawful right of possession is vested in the purchaser at the tax sale, either the State or other party, the former owner can no longer claim to have such title and the occupancy as would support a claim of homestead exemption."

I further call your attention to Title 51, Section 37, Code of Alabama 1940, which provides as follows:

"§ 37. Commencement and completion of assessment; supplemental assessment.—The return and listing of property, for taxation by the tax assessor must commence on the first day of October in every year, and shall be finished by him on the first day of January following; but the assessor may be allowed through the third Monday in January in each year to make a supplemental return or list of property which he may have failed to have returned or listed prior to the first day of January, and such supplemental return must be entered as any other return and shall be embraced in the abstracts made for the department of finance and tax collector and department of revenue."

With further reference to that subject the holding of the opinion of this office as the same appears in Quarterly Report Vol. X, Page 27, is of importance. I quote from that opinion, to wit:

"It is my opinion that the taxpayer must assert his or her claim for a homestead exemption on or before the third Monday in January, 1938, or failing therein, he waives the same for the then current year.

"The aforementioned conclusion fixes a limitation co-extensive with the time fixed by law for the return of property by a taxpayer."

See also—Jones v. Johnson, Tax Assessor, 240 Ala. 357, 199 So. 539.

In the matter before us the property was sold in 1933 and the state purchased the same at the tax sale and the state owned it in August, 1942, when it was redeemed by the former owner, Mr. A. From the date of sale until the date of redemption the former owner, Mr. A, did not have such title and occupancy as would support a claim of homestead exemption. At the time of the redemption the time for the assessment of said property for that tax year had expired so far as the former owner was concerned. A claim of homestead exemption presupposes an assessment.

Upon the question of assessments after redemption I call your attention to Title 51, § 313, Code of Alabama 1940, as follows:

"§ 313. Duty of judge of probate on redemption of land bid in by state.—Within five days from the redemption of any real estate bid in by the state, the judge of probate shall notify the tax assessor and tax collector of his county thereof, and shall, on demand, pay to them the costs and fees to which they are respectively entitled; and the assessor shall enter such real estate, and the name of the person redeeming the same, on an appropriate list to be kept by him for assessment."

It is to be noted the assessment in such cases is the act of the tax assessor and not the taxpayer. The taxpayer does not act in that matter at any time.

It is therefore my opinion that the former owner and person redeeming did not in August, 1942, have the legal right to have granted to him a homestead exemption for the tax year 1942.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

December 18, 1942.

Hon. H. M. Hughes,
Clerk of the Circuit Court,
Madison County,
Huntsville, Alabama.

Circuit Clerks — Commissions, percentages, deductions — Title 29, Section 227, Code 1940—Title 13, Section 178, Subsection 16, Code 1940—Title 37, Section 588, Code 1940—

Clerks of circuit courts entitled to commission, percentage, or deduction as provided by Title 13, Section 198, Subsection 16 on funds or allowances coming into his hands under provisions of Title 29, Section 227, Code of 1940, where case of condemnation and forfeiture of prohibited liquors arose in the circuit court.

Clerk of circuit court not entitled to commission, percentage or deduction on funds where allowances paid to him by ABC Board in condemnation and forfeiture of prohibited liquors where case first arose in municipal court and appealed to circuit court and there affirmed, when making remittance to clerk of municipal court. Penalty is provided by Title 37, Section 588, Code of 1940, for failure of circuit court to make such remittance.

Opinion by Assistant Attorney General Harris.

Dear Sir:

Your request for official opinion bearing date of December 4, 1942, is as follows:

"I wish to refer you to Title 29, Section 227, and will greatly appreciate an opinion as to whether or not the Clerks of Circuit Courts are entitled to the regular 5% commission on net amounts paid into the County's General Fund, also would like to know if the 5% will apply on net amounts remitted to Municipalities received by them, from the State Alcoholic Beverage Control Board for confiscated whiskey and beer.

"Please let me have this opinion at the earliest possible date as the ABC Board is taking over a quantity of whiskey and beer from the Sheriff of this County and I am anxious to know if the 5% is deductible when I make my remittances to the County or Municipality."

The section to which you refer in your request reads as follows: (Section 227, Title 29)

"§227. (4758) Trial and judgment of forfeiture, and order of destruction.—If no party appear to make a claim at the time specified in the notice, or if no verified answer controverting the allegations of the complaint and the grounds of complaint is interposed, the judge or justice shall proceed to hear the testimony in support thereof. If it be established upon the hearing before said judge or justice, or upon the trial of the action, if issue be joined, that the liquors so seized are kept, stored or deposited for the purpose of unlawful sale or other disposition, or furnishing or distribution within this state, or if it appears that the complainant has established a ground for the issuance of such search warrant, judgment of forfeiture of said liquors and vessels shall be entered, which judgment shall order the immediate delivery of said liquors and vessels to the alcoholic beverage control board, at Montgomery, Alabama, whereupon said board shall determine the reasonable value thereof; and the amounts so determined by said board to be the reasonable value thereof shall be paid by the board to the clerk of the court in which such order of forfeiture was made. In the case of non-federal tax paid liquors, the court shall order the same to be publicly destroyed. **And funds paid into court, as herein provided, shall be applied first to the payment of the court costs in such case, and the balance, if any, shall be paid into the general fund of the municipality or county in which said case arose.**" (Emphasis supplied)

The emphasized portion of the above question leads me to believe that the occasion may never arise when you will be concerned with the matter of making remittances to a municipality involving funds paid under this section. The funds paid under this section can only be paid to the clerk of the court in which the case arose. In cases arising in municipal courts the funds provided for under this section must be paid to the clerk of said municipal courts. Likewise, in cases arising in the circuit court the funds paid under this section must be paid to the clerk of the circuit court.

The 5% commission allowed the clerk of the circuit court on amounts paid by him to the custodian of county funds is provided for by Title 13, Section 198, Subsection 16, Code of 1940, and reads as follows:

"§198. Duties of Clerk.—It is the duty of the clerk of the circuit court: *** 16. To render to the county treasurer, court of county commissioners, or board of revenue, as of December thirty-first and June thirtieth of each year, a statement in writing and under oath, of the fines assessed and forfeitures obtained during the preceding six months, the amount of each, and against whom each was assessed or obtained and also what money they have received for the county, specifying from whom, on what account, and the amount in each case; and, after deducting their compensation, they must pay the balance to whomsoever is custodian of the county funds. *** "

Any amount paid to you under Section 227, Title 29, Code of 1940, after the payment of the court costs in such cases, is money received by you for the county under the provisions of Title 13, Section 198, Subsection 16, supra, and is subject to 5% deduction allowed by law. Cf. Biennial Reports, Attorney General, 1928-30, page 990.

In the event that proceedings for condemnation and forfeiture of prohibited liquor are begun in a municipal court, resulting in judgment of condemnation and forfeiture, and the case is appealed to the circuit court, and is there affirmed, the allowance provided by Section 227, Title 29, supra, if paid to the clerk of the circuit court, must be remitted to the clerk of the municipal court in which the case arose by the clerk of the circuit court. The clerk of the circuit court, in this event, is not legally authorized to retain any percentage, commission or deduction for his own account in making such remittance. Cf. Quarterly Reports, Attorney General, Volume XVIII, page 218. A penalty is provided by Title 37, Section 588, Code of 1940, for failure of the circuit court to make such remittance.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

December 21, 1942.

Hon. C. J. Kettler, Solicitor,
Second Judicial District,
Luverne, Alabama.

Circuit Solicitor—Suitable Offices

1. Under the provisions of House Bill No. 147, General Acts of Alabama 1939, page 468, approved August 31, 1939, the several Counties of the State are required to provide suitable offices for the Circuit Solicitor in the County where such Solicitor resides.

2. The County where the Circuit Solicitor resides is required to provide a suitable office for the Circuit Solicitor and that places upon that County the duty to provide said office with electric lights and janitor service and to pay for the same.

Opinion by Assistant Attorney General Moore.

Dear Sir:

Your request for an official opinion bearing date of December 10, 1942, is as follows:

"I am writing for an opinion with reference to lights and janitor service in my office.

"Under a legislative act approved August 31, 1939, the Circuit Solicitors of the several judicial Circuits of the State were granted an increase in salary, and also provided suitable offices in the Counties where the Solicitors resided, said offices to be furnished by the county of the residence of the Circuit Solicitor.

"My circuit is composed of Crenshaw, Butler and Lowndes Counties, and I reside in Crenshaw County.

"Crenshaw County has furnished me an office in compliance with this act, but does not provide lights nor janitor service for my office. I would appreciate your opinion as to whether this act requires that the county furnish me with lights for my office and janitor service."

The answer to your inquiry calls for a consideration of House Bill No. 147, General Acts of Alabama 1939, page 468, approved August 31, 1939, this being the Act mentioned in your inquiry. The portion of that Act pertinent to the matter here involved appears as the last sentence of Section 3 of said Act, and is as follows:

"The several Counties of the State are hereby authorized, directed, and required to provide suitable offices for the use and occupancy by such solicitors, deputy solicitors and assistant deputy solicitors in the counties where such officers reside, and the state shall furnish such offices and

officers with telephone service, stationery, stamps, and other necessary equipment for the use of such officers and offices."

This office has heretofore held that under the above stated provision of said Act the County where such officer resides is required to provide suitable offices for the use and occupancy by such solicitors. In that connection I refer you to an opinion of this office rendered to Hon. C. J. Kettler, Solicitor 2nd Judicial Circuit, Luverne, Alabama, on June 18, 1940, Quarterly Report Attorney General of Alabama, Vol. XIX, page 299, and also an opinion of this office rendered on November 21, 1939, to Hon. W. R. Williams, Judge of Probate, Marshall County, Guntersville, Alabama, Quarterly Report of the Attorney General of Alabama, Vol. XVII, page 289.

I do not find an opinion of this office that determines what the phrase "Provide suitable offices" includes as the same is used in the above mentioned Act, or that gives an inclusive definition of it. I have also been unable to find a decision of the Courts of last resort of this State that defines that phrase as used in said Act.

The Court of Appeals of Kentucky in the case of *Commonwealth v. Louisville & N. R. Co.*, 191 Ky. 634, 231 S. W. 236, in construing an indictment of the Railroad Company under a statute of the State of Kentucky which provided, "Every Company operating a railroad in this State shall provide a convenient and suitable waiting room and water-closet or privies at all depots in cities and towns; and at such stations as the Railroad Commission may require on its lines, ***." had this to say:

"It (the indictment) proceeded to charge the defendant company with specific acts which rendered the waiting room in the depot inconvenient and unsuitable for the purpose for which it was intended, by setting forth (1) that the waiting room was too small; (2) was not sufficiently lighted or ventilated; (3) was not supplied with suitable furniture and fixtures; and (4) was not maintained in decent order and repair. If the waiting room was too small to be suitable or convenient for the traveling public which used the depot to board the defendant's trains, and this fact was proven to the jury, it should have found the defendant company guilty of the offense charged in the indictment. So should the jury have found the defendant guilty on proof that the company had failed to sufficiently light or ventilate the waiting room, for a room not sufficiently lighted or ventilated would not be suitable or convenient in which to wait at a depot for a train. ***. In other words, a waiting room is not suitable or convenient for waiting passengers which is too small, dark, stuffy, or which is dirty or indecent."

Thus the Kentucky Court of Appeals gave to the phrase "provide a convenient and suitable waiting room" the attribute of continuance and likewise the element of maintenance. It called for something more than just four walls with a roof and a door. It called for light, ventilation, and a room maintained in decent order and repair. A clean room was called for by the word suitable.

Webster's New International Dictionary defines the word suitable as follows:

"Suitable, a. Capable of suiting; fitting; proper; becoming; as, language suitable for the subject."

And the same authority gives the following synonyms for the word suitable:

"Syn.—Proper, fitting, becoming, accordant, agreeable, competent, correspondent, compatible, consonant, congruous, consistent."

The word fit is defined by the above authority as follows:

"Fit, a. 1. Adapted to an end, object, or design; suitable by nature or by art; suited by character, qualities, circumstances, education, etc.; qualified; competent; worthy"

It is elementary that the meaning or definition of a word or phrase depends upon its context. As an aid to the meaning of the word "suitable" or the phrase, "to provide suitable offices" as used in the Act in question we may look to the part or parts of the Act preceding or following the word or phrase that are so intimately associated with the word or phrase as to throw light upon its meaning. When that is done in this case we find that the Act covers the entire field of the serious and important duties of a Circuit Solicitor, confines his practice of the law to a discharge of those duties, provides for his salary, his offices, that is suitable offices for him as such Solicitor, stamps, telephone service, stationery, and other necessary equipment for the use of such officers and office, and in addition thereto provides for other expenses of such Solicitor and grants to him additional compensation to his salary for the extra, new, and additional duties and limitations imposed on said Solicitor. It is clear that the Act was designated to place the Circuit Solicitor upon a non-expense basis. That is the immediate context of the word or phrase in question.

I am not limited to the immediate context of the word or phrase for its meaning. In that connection I call your attention to the case of Department of Industrial Relations v. Drummond, 1 So. 2d 395. Certiorari denied in that case by the Supreme Court, 1 So. 2d 402. The opinion in that case written by Judge Simpson contains the following:

"In determining the meaning of a statute, the court will consider the external, historical facts which led to its enactment, *Southern Express Co. v. I. Brickman & Co.*, 187 Ala. 637, 65 So. 954; *American Bakeries Co. v. City of Opelika*, 229 Ala. 388, 157 So. 206; and so construe it as to effectuate the purpose of the Legislature in passing it, *Lynne v. Broyles Furn. Co.* 3 Ala. App. 634, 57 So. 122; *Ward v. State*, 17 Ala. App. 170, 82 So. 660, 662, certiorari denied, 203 Ala. 306, 82 So. 662; *Allgood v. State*, 20 Ala. App. 665, 104 So. 847; 'an interpretation should never be adopted which would defeat the purpose of the statute, if any other reasonable construction may be given to it, (*The Emily*) 9 Wheat. 381 (6 L. Ed. 116); and the literal interpretation of an act is not always that which either reason or the law approves. The inartificial manner in which many of our statutes are framed, the inaptness of expression frequently used, and the want of perspicuity and precision not unfrequently met with, often require the court to look less at the letter or words of the statute, than at the context, the subject-matter, the consequences and effects, and the

reason and the spirit of the law, in endeavoring to arrive at the will of the law giver.' *Thompson v. State*, 20 Ala. 54, 62; *Crosby v. Hawthorn*, 25 Ala. 221; *Davis & Co. v. Thomas*, 154 Ala. 279, 45 So. 897; *State v. Dodd*, 17 Ala. App. 20, 81 So. 356; *Nunez v. Borden*, 226 Ala. 381, 147 So. 166."

Without going into further detail from a consideration of the external and historical facts which led to the enactment of the Act in question and the Act itself it is evident that the purpose of the Act was to place the solicitor on a non-expense basis.

It would not be seriously contended that the State had complied with its duty to furnish stationery for the use of the solicitor by furnishing him with ordinary brown wrapping paper cut into the proper size with his name, position and address printed upon the same. That would not be a compliance with the Act in that respect though the word "stationery" is not modified or described by the word "suitable" in the Act. Nor does a County provide a suitable office for the Circuit Solicitor under the Act by providing an office without lights or janitor service. The office the County is required to provide for the Circuit Solicitor is a suitable office for a Circuit Solicitor. Such an office must of necessity be provided with electric lights and janitor service.

The duty imposed on the county under the Act is a continuing duty. It exists each day. A dark office without the proper lights is not a suitable office within the meaning of the Act, nor is a dirty and unclean office a suitable office under the provisions of the Act.

It is my opinion that Crenshaw County, Alabama, the county of your residence, is impressed with the duty by the Act to provide you, as the Circuit Solicitor of that Circuit, with a suitable office and that places upon that county the duty to provide your said office with electric lights and janitor service and to pay for the same.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

December 29, 1942.

Hon. B. P. Singleton,
Chief Examiner of Accounts,
Capitol.

Sheriff's Costs—Summoning Jury in Capital Cases—

1. Sheriff's allowance for summoning jury in capital case is paid out of the county treasury whether there is a conviction or not.
2. Where there is a conviction in a capital case and the Department of Corrections and Institutions pays the \$3 for summoning the jury, the sheriff receives no part of this as he has already been paid for this service by the county and this amount must be sent to the county treasury and credited to the general fund.
3. The allowance to the sheriff for summoning jury in a capital case can, under no circumstances, become a charge against the county fine and forfeiture fund.
4. This \$5 allowance may not be taxed against the defendant as part of the cost in the case.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your request for official opinion bearing date of November 16, 1942, is as follows:

"Please refer to Subsection D of Section 83 of Title 11, Section 100 of Title 11, and Section 69 of Title 45, 1940 Code, and to your opinion on Page 349, Biennial Report, 1936-38, and advise me in answer to the following questions:

"1. Should a Sheriff collect \$5.00 from the County Treasury for summoning jury in capital case whether convicted or not?

"2. If the answer to the above is in the negative, should the State Department of Corrections and Institutions pay \$3.00 account of a Sheriff's summoning jury in capital cases and a County General Fund (County Treasury) pay \$2.00, in case the defendant is convicted and sentenced to the penitentiary?

"3. Under what conditions would a County Fine and Forfeiture Fund be liable for \$2.00 where a Sheriff had summoned a jury in a capital case?

"4. If you should hold that the Sheriff's fee of \$5.00 for summoning jury in capital case should be paid entirely out of the County Treasury (General Fund), could this \$5.00 be taxed against the defendant as part of the cost in the case?"

My answer to your first inquiry is in the affirmative.

Your attention is called to Title 11, Section 100, Code 1940, where it is provided:

"For summoning jury in capital case, or at any special court for the trial of criminal to be paid out of the county treasury\$5.00'

Our Supreme Court in the case of **Weaver v. Tidwell**, 228 Ala. 169, 153 So. 218, has held that where the term "county treasurer" is used in the statutory law of this State, this term has reference to the general fund of the county. It is my opinion that this \$5 allowance attaches in all capital cases where the sheriff has summoned a jury, whether conviction follows or not. Of course, if the defendant is convicted and sentenced to the penitentiary, and the Department of Corrections and Institutions pays the \$3 allowed under Title 45, Section 69, Code 1940, then it would be the duty of the party to whom payment is made to remit this \$3 to the county treasurer to be credited to the general fund.

Since my answer to your first inquiry is in the affirmative, it is not necessary that I answer your second inquiry.

In answer to your third inquiry, the fine and forfeiture fund of the county can, under no circumstances, be made subject to this allowance, as the statute, as pointed out above, specifically provides that this allowance is payable out of the general fund. **Weaver v. Tidwell**, supra.

My answer to your fourth inquiry is in the negative.

It is my opinion that the \$5 which a sheriff receives for summoning a jury in a capital case is in the nature of an allowance to be paid from the general fund of the county, and that it is not an item of cost which can be charged to a defendant.

Section 100, of Title 11, Code of 1940, provides for fees and allowances to a sheriff in criminal cases. The fees are a part of the cost and can be taxed against a defendant. However, it is my judgment that the allowances provided for in said section, which are specifically made payable out of the general fund of the county, cannot be taxed against the defendant as cost.

The opinion appearing in Biennial Report, Attorney General, 1936-38, page 349, being in conflict with the holding hereinabove, is hereby expressly overruled.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

December 29, 1942.

Hon. G. Claiborne Blanton,
Judge of Probate,
Dallas County,
Selma, Alabama.

Counties—Alabama Citizens' Committee— Health

County governing body authorized to appropriate funds for health and hospital survey.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for official opinion under date of October 14, 1942, is as follows:

"Official Opinion is requested on the following subject:

"Does the Court of County Revenues of Dallas County, Alabama—or similar governing bodies of Alabama—have authority to appropriate from its general fund to the Alabama Citizen's Committee to promote a health and hospital survey when requested so to do by the State Board of Health?

"On April 15, 1942, the Court of County Revenue of this County made an appropriation to the State Board of Health in the amount of \$50.00. The check was made payable to the order of the State Board of Health and endorsed by Dr. L. T. Lee, Medical Officer, Dallas County. Whereupon the check was mailed to Colonel H. O. Murfee to be used in furtherance of the work of the Alabama Citizen's Committee. This action was taken by us following telephone conversation either with Dr. Austin or Dr. Cannon—With Dr. Austin, I think.

"You will note from the attached letter that the State Board of Health has mailed to all appropriating bodies a letter requesting that future appropriations be made direct to the Alabama Citizens' Committee and not to the State Board of Health. The last paragraph of their letter states that their action is construed to cover appropriations already made in answer to Colonel Murfee's request of September 12, 1942.

"Since the Dallas County appropriation—and possibly some others—was made prior to September 12, 1942 and since, under Subsection 19 of Section 12 of Title 12 of the 1940 Code of Alabama, there is no specific naming of the Alabama Citizens' Committee and in order that the appropriating bodies of Alabama may in the future legally appropriate funds to the Alabama Citizens' Committee, this request for opinion is made."

It is my opinion that your inquiry should be answered in the affirmative. County governing bodies are authorized by Code of 1940, Title 12, Section 12 (19) as follows:

✓ "To appropriate money to promote or enforce the health and quarantine laws of the state for the benefit of the county and its inhabitants, when requested so to do by the state board of health." 1)

The State Board of Health having already requested the various county governing bodies to make appropriations, (if they see fit to do so), the sole remaining question for solution is whether or not the promotion of a health and hospital survey is a promotion of the health and quarantine laws of this state.

The authority to appropriate money for the promotion of the health laws of the State of Alabama invests in the county governing bodies a wide discretion. It is apparent that the legislature intended to give county governing bodies authority to spend money, in their discretion, for the promotion of public health, and did not wish to unduly hamper them by restricted legislation.

The health laws of the State of Alabama are set out in the Code of 1940, Title 22, and are very extensive. It is provided, however, by Title 22, Section 7(2) as follows:

✓ "To investigate the causes, modes of propagation, and means of prevention, of diseases." 1)

To investigate the means of prevention of diseases, is, in my opinion, ample authority for the conduction of a health and hospital survey. Of course, if the State Board of Health has the authority to make such a survey, it has the right to authorize some agency to do it, and appropriations from the various counties should be made direct to that agency.

That such a survey will benefit the county and its inhabitants is manifest by the fact that the survey is to be state wide and will therefore be of benefit to every county in the state.

It should be borne in mind that this opinion does not reach the conclusion that counties must appropriate to the Alabama Citizen's Committee for this "Health and Hospital Survey," nor does it express an opinion as to the wisdom of so doing, but merely expresses the fact that the various county governing bodies are authorized to do so if they so desire. There is a double safeguard thrown around such an appropriation as this. First, the State Board of Health must request the county to appropriate, then second, the county governing bodies may make appropriations or not, as they see fit.

In view of such safeguards I think it apparent that it was not the legislative intent to strictly limit the county governing bodies in such respect, and certainly local self government should not be hampered by restrictive, judicial or administrative constructions.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

December 29, 1942.

Dr. E. B. Norton, Superintendent,
State Department of Education,
Montgomery, Alabama.

County and city boards of education in Alabama may revise 1942-43 school budget and grant an increase of salary to teachers, spread over the 1942-43 scholastic year, but only on condition that the school is operated for a minimum period of eight months and no deficit is incurred.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Your letter of December 21, 1942, in which you request an official opinion, is as follows:

"Does a county or city board of education have the authority during a scholastic year with the approval of the teachers involved, to revise the contracts with such teachers in order to increase teachers' salaries, such increases to be retroactive to the beginning of the scholastic year, provided that such board of education operates the schools in the tax districts under its jurisdiction for at least eight scholastic months and does not violate the provisions of the school budget act (Article 5 of Title 52 of the Code of Alabama of 1940)?"

It is my opinion that your question, subject to the conditions stated and those hereinafter noted, should be answered in the affirmative.

Tax revenues for all departments of government vary from year to year. Estimates of such revenues are frequently revised from time to time to meet changing conditions that increase or decrease the revenue. Hence, the Legislature, in enacting Article 5, Chapter 10, Title 52, Code of 1940, establishing a budget system for the public schools of Alabama, wisely inserted in Section 241, Article 5, *supra*, a provision as follows:

"A county or city superintendent of education with the approval of his board shall have authority during the fiscal year to make such changes within the budget as are deemed desirable, provided that schools are operated for the state minimum term according to rules and regulations of the state board of education and provided that a deficit is not incurred by such change or changes."

Thus, it was foreseen by the Legislature that decreases in revenue available to meet appropriations for the operation of public schools, or increased appropriations by the Legislature during the fiscal or scholastic year, might necessitate or authorize an increase or decrease in various items included in the budget. Authority to make revisions was given on condition that the school is operated for the minimum term according to the rules and regulations of the State Board of Education and that no deficit is incurred.

The aforementioned provision is pertinent to the question you present herein for the reason that the Legislature of Alabama, in recent session, did, by Act No. 6, approved November 20, 1942, additionally appropriate the sum of \$2,000,000 to the credit of the Minimum Program Fund for the 1942-43 fiscal year only, "for the purpose of extending the state minimum term of the several public schools throughout the state to eight months for the 1942-43 scholastic year." The Legislature sought to insure the use of the money for an extension of the term to eight months by providing in the act that "no board of education shall be entitled to receive any part of this appropriation unless it operates the schools in tax districts under its jurisdiction during the scholastic year of 1942-43 at least a minimum term of eight scholastic months."

This additional appropriation makes more money available to those schools already operating eight and nine months through local tax efforts, as well as to those operating for a less period of time. Coming as it does after the budget for the scholastic year had already been set up and determined, many school units will find it necessary to revise the budget to absorb the additional money that was not lawfully available for inclusion in the budget but which was contemplated and expected, at the time the budget was fixed, to be made available as was done. No doubt, as you have informed me in conversation, many boards employed teachers with a moral agreement that an increase in pay would be granted and made retroactive should the recent appropriations be made.

It is my opinion that the authority to revise the budget carries implied authority to the county and city boards of education in Alabama to change, both retroactively and prospectively, the employment contracts with teachers for the year 1942-43, such change to provide monthly increase in pay (with consent of the teachers) during the 1942-43 scholastic year, but only on condition that the school operates for a minimum term of eight months and no deficit is incurred. The increase in pay may be spread over the entire scholastic period of 1942-43.

Nothing in this opinion is to be construed to hold or intimate that the \$2,000,000 appropriated by Act No. 6, supra, can be used for the purpose of increasing teachers' salaries.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

December 31, 1942.

Hon. Clyde C. Pearson, Secretary,
Board of Registration of Architects,
115 South Union Street,
Montgomery, Alabama.

Architect—License

1. The fee of five dollars required by Section 15, Title 46, Code of Alabama 1940, of architects for renewal of the certificate for registration is a fee charged for a privilege license.

2. An architect in the armed forces of the United States and not now actually engaged in the occupation, profession or business of an architect is not liable for the license tax.

Opinion by Assistant Attorney General Moore.

Dear Sir:

Your request for official opinion bearing date of December 21, 1942, is as follows:

"I am enclosing a copy of our last annual report in which you will find a copy of The Registration Act and By Laws of this Board.

"We would appreciate it if you would render us an opinion at your earliest convenience as to whether this Board has a right to waive dues of registrants that are serving in the Armed Forces of our Country. Paragraph 15 of the Act (Page 7), states that certificates expire on the last day of December and become invalid on that day unless renewed."

The answer to your inquiry calls for a construction of certain sections of the Law of Alabama relating to the practice of an architect. It is to be noted that Title 46, Code of Alabama 1940, is entitled "PROFESSIONS AND OCCUPATIONS" and that Chapter 2 thereof is entitled "Architects," in which chapter appears the sections of the law in question.

Section 15 of Title 46, Code of Alabama 1940, is as follows:

"§ 15. Issuance of certificate of registration; expiration; renewal fees and penalties.—The board shall receive applications for registration as an architect only on forms prescribed and furnished by said board and upon receipt of such application and the payment of a fee of twenty-five dollars to said board, may issue to such applicant without detailed examination, a certificate of registration as an architect provided such applicant meets the following requirements: Any person who holds a like unexpired certificate issued to him by proper authority in the District of Columbia or any state of any territory of the United States or in any province of The Dominion of Canada in which the requirements for the registration of architects, are approved by the board as substantially equivalent to those fixed and determined by this chapter, may be entitled to receive such

certificate to practice architecture without an examination by said board. The following facts established in the application may be regarded as prima facie 'evidence' satisfactory to the board that the applicant is fully qualified to practice architecture. Graduation after a course of not less than four years in architecture from a school or college of architecture, approved by the board as of satisfactory standing and an additional three years actual engagement in architectural work in the office or offices of a reputable architect or architects. Persons who have passed the junior or senior examination and received a certificate of 'National Council of Architectural Registration Boards.' All other applicants must be of good moral character and shall pass satisfactorily, under the rules and regulations fixed by the board, an examination to be conducted by three examiners selected by the board. The examiners may conduct examinations at least twice a year. Such examiners must promptly make report and recommendations to the board after each such examination. In determining the qualifications for registration, a majority vote of the members of the board shall be required. In case the board denies the issuance of a certificate to an applicant one half of the registration fee paid by the applicant shall be repaid by the board to said applicant. Certificates for registration shall expire on the last day of December following their issuance or renewal and shall become invalid on that day unless renewed. Renewal may be affected at any time prior to or during the month of December by the payment of a fee of five dollars. Penalty or penalties not to exceed the sum of five dollars may be added by the board to the renewal fee for failure to renew his or her certificate on or before the last day of each December."

That section, so far as the question here involved, deals with two separate matters, (1) the application for registration as an architect based upon prescribed qualifications and payment of the fee of twenty-five dollars for admission to registration, and (2) a renewal of the certificate for registration for which a fee of five dollars is provided. Under the terms of that section of the law the renewal of the certificate for registration is based upon the payment of the required fee of five dollars all questions of qualifications having been determined by the Board on the original application. The only reasonable construction that I am able to place upon the renewal fee is that it is a license fee paid for the privilege of practicing or offering to practice as an architect in this State. True it is called a fee for the renewal of the certificate of registration, but the practical application of it is that it purchases the right to continue for a period of one year the privilege of practicing or offering to practice as an architect in this State. After the applicant is once admitted to practice and paid the application fee the renewal is merely a matter of paying the fee. It is my opinion that said fee is the charged for a privilege license. In your inquiry you use the word dues, whereas the word fee is used in the statute.

In coming to the above conclusion I have had in mind the rules of statutory construction as outlined by Judge Simpson in the case of *Department of Industrial Relations v. Drummond*, 1 So. 2d. 395, (Court of App. of Ala.) in which certiorari was denied by the Supreme Court, 1 So. 2d. 402, in the following language:

"In determining the meaning of a statute, the court will consider the external historical facts which led to its enactment, *Southern Express Co.*

v. I. Brickman & Co., 187 Ala. 637, 65 So. 954; American Bakeries Co. v. City of Opelika, 229 Ala. 388, 157 So. 206; and so construe it as to effectuate the purpose of the Legislature in passing it, *Lynne v. Broyles Furn. Co.* 3 Ala. App. 634, 57 So. 122; *Ward v. State*, 17 Ala. App. 170, 82 So. 660, 662, certiorari denied, 203 Ala. 306, 82 So. 662; *Allgood v. State*, 20 Ala. App. 665, 104 So. 847; 'an interpretation should never be adopted which would defeat the purpose of the statute, if any other reasonable construction may be given to it, (*The Emily*) 9 Wheat. 381 (6 L. Ed. 116); and the literal interpretation of an act is not always that which either reason or the law approves. The inartificial manner in which many of our statutes are framed, the inaptness of expression frequently used, and the want of perspicuity and precision not unfrequently met with, often require the court to look less at the letter or words of the statute, than at the context, the subject-matter, the consequences and effects, and the reason and the spirit of the law, in endeavoring to arrive at the will of the law giver.' *Thompson v. State*, 20 Ala. 54, 62; *Crosby v. Hawthorn*, 25 Ala. 221; *Davis & Co. v. Thomas*, 154 Ala. 279, 45 So. 897; *State v. Dodd*, 17 Ala. App. 20, 81 So. 356; *Nunez v. Borden*, 226 Ala. 381, 147 So. 166."

I further call your attention to Section 8, Title 46, Code of Alabama 1940, as follows:

"§ 8. Qualification and registration necessary for lawful practice.— In order to safeguard life, health and property any person practicing or offering to practice as an architect in this state shall be required to submit evidence that he is qualified to practice and shall be registered as hereinafter provided; and it shall be unlawful for any person to practice or offer to practice in this state as an architect except in compliance with the provisions of this chapter."

That section clearly shows that right to practice as an architect is based upon his original application and qualification. The privilege for exercising that right is based upon the payment of the five dollar fee. That is the definition or practical application of a license fee.

Further Section 13 of Title 46, Code of Alabama 1940, provides that the fee shall be certified into the State Treasury. The fee is levied by the State statute and paid into the State Treasury. It is not levied by the Board but by the State.

"A person is not liable under a statute or ordinance authorizing a license tax to pursue a given occupation or business if he is not actually engaged in such occupation or business."

37 C. J. 249, Section 115.

Fuller v. City of Dothan, 26 Ala. App. 91.

A registrant under the above laws serving in the armed forces of the United States is not actually engaged in the occupation or profession or

business of an architect and is not liable for the license tax.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

December 31, 1942.

Hon. B. P. Livingston,
Chief Division of Plant Industry,
Department of Agriculture and Industries,
Capitol.

Agriculture and Industries—Licenses—Farm Products—Nursery
Stock—Municipality—

1. Landscape planter not liable for State or county license as such.
2. Landscape planter who produces own nursery stock not liable for municipal license for selling same.
3. "Farm products" include nursery stock.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request of December 8, 1942, for my official opinion is as follows:

"We are enclosing a copy of a letter from Mr. H. B. Chase of Chase Nursery Company, Chase, Alabama and would appreciate very much your giving us an opinion on the 3d paragraph of this letter.

"Also, we are enclosing a copy of a letter dated January 10, 1933, giving an opinion by the Hon. Thomas E. Knight, Jr., with reference to the sale of nursery stock in cities. We are wondering if we should not have a new opinion since the code numbers have been changed, as we have to use this opinion quite frequently."

The question presented by your inquiry is whether or not a person who lives without the city limits, grows his own nursery stock, handles it himself, sells it himself, and plants it himself would be liable for a State, county or city license as a landscape planter.

A careful search of the sections of the 1940 Code, wherein privilege licenses are levied on various occupations and professions fails to reveal any

State or county license imposed for engaging in the business or profession of landscape planting or gardening, other than the State permit fee provided by Code 1940, Title 2, Section 674.

Code 1940, Title 2, Section 481, provides as follows:

"§481. Sale of farm produce by the producer.—It shall be unlawful for any municipality to charge the farmer or others engaged in the production of farm products of whatever nature, any license fee for the sale or other disposition of such farm products produced by them at any place; nor shall such municipality prevent the sale of such products by the producer thereof when the said farmer shall have complied with all reasonable regulations for the sale of such products in such municipality."

"Farm products" are defined by Code 1940, Title 2, Section 473, as follows:

"§473. Farm products.—The term 'farm products' shall, except as otherwise provided, include all agricultural, horticultural, vegetables and fruit products of the soil, meats, marine food products, poultry, eggs, dairy products, wool, hides, feathers, nuts and honey, but shall not apply to seeds sold at retail, nor include timber products, tea, coffee, or pelts of fur-bearing animals."

An opinion of this office rendered on January 10, 1933, to the Commissioner of Agriculture and Industries (Biennial Report of Attorney General, 1932-34, page 123) held that the term "farm products" includes nursery stock. Therefore, it is my opinion that a municipality would not be authorized to impose a license upon one for the disposing of nursery stock produced by that person.

The premises considered, it is my opinion that such a person would not be liable for a State, county or municipal license, other than the State permit fee provided by Code 1940, Title 2, Section 674, for the sale or other disposition of such nursery stock by the producer thereof. However, if such a person, in addition to disposing of said nursery products within the city, engages in the business of landscape gardening, such as planting the nursery stock, etc., he would then be liable for any municipal license imposed for engaging in such profession.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

INDEX

INDEX

	Page
ACTS (General and Local)	
GENERAL ACTS 1939:	
Page 468	108
GENERAL ACTS 1942:	
Act No. 2	99
GENERAL ACTS 1942:	
Act No. 6	116
LOCAL ACTS 1888-89:	
Page 1164	93
LOCAL ACTS 1907:	
Page 82	93
LOCAL ACTS 1923:	
Page 288	24
LOCAL ACTS 1932:	
Page 35	5
LOCAL ACTS 1939:	
Page 86	24
LOCAL ACTS 1939:	
Page 87	88
LOCAL ACTS 1939:	
Page 244	56
LOCAL ACTS 1939:	
Page 261	96

INDEX—Continued

	Page
AGRICULTURE AND INDUSTRIES:	
Licenses—Farm Products—Nursery Stock—Landscape Planter	121
ALABAMA BEVERAGE CONTROL BOARD:	
Retail liquor license—Discretion as to renewal	57
ALABAMA CITIZENS' COMMITTEE:	
Counties authority to appropriate to	114
ARCHITECTS:	
License—Renewal fee—Not liable for while in army	118
ASSESSMENTS:	
Appeals—Assessment on which taxes paid pending	31
BONDS:	
Counties—Refunding—Advertisement	96
CIRCUIT CLERKS:	
Condemnation of Whiskey—Commission	105
CLERKS—CIRCUIT COURTS:	
Fee—Case Appealed and Reversed then nol prossed—	
Judgment fee—Trial fee	44
Fee for making transcript when probation revoked	89
Fees—Recognizance	42
Liability for omission for item of cost	86
CLERK OF INFERIOR COURT:	
Fee—Summons and proceedings to judgment	88
CODE OF ALABAMA, 1940:	
TITLE 2:	
Sections 115 to 133	76
Sections 473-481	121
Section 674	121

INDEX—Continued

	Page
TITLE 7:	
Section 506	33
Section 506	78
Section 508	78
Sections 508-509	86
Section 511	78
Section 515	78
Section 518	78
Section 526-527	78
Sections 574-582 through 585	33
Section 606	78
Section 625	103
TITLE 10:	
Section 150	29
TITLE 11:	
Section 4	86
Section 34	86
Section 38	88
Section 79	24
Section 80	13
Section 83	13
Section 83 (d)	112
Section 84	13
Section 89	42, 44, 89
Section 100	36, 112
TITLE 12:	
Section 12 (19)	114
Section 33	40
Sections 104-109	96
Section 177	5
TITLE 13:	
Section 178 (16)	105
Sections 256-257	19
Section 316	13
Section 326	13
Section 418	24
Section 477	93

INDEX—Continued

	Page
TITLE 15:	
Section 187	42
Section 393	13, 40
TITLE 22:	
Section 7 (2)	114
Sections 47-74	64
Section 74	46
Section 215	76
Section 264	46
Sections 264-268	64
Section 269	46
TITLE 23:	
Sections 16-48	38
TITLE 29:	
Sections 5-26-27-29	57
Section 129	13
Section 227	105
TITLE 37:	
Section 259	96
Section 588	105
Section 786-808	52
TITLE 41:	
Section 18	99
Section 50 (3)	86
Section 211	56
TITLE 45:	
Section 69	112
TITLE 46:	
Sections 8-13	118
Section 15	118

INDEX—Continued

	Page
TITLE 49:	
Section 8	8
TITLE 51:	
Section 1 (b)	45
Sections 4, 5, 7, 8	91
Section 37	103
Section 110	31
Section 266	73
Section 276	73
Section 311	73
Section 313	103
Section 267	23
Sections 388-392	49
Section 692	83
Sections 692-693	63
TITLE 52:	
Sections 15-52	43
Section 164	27
Sections 553 et seq	43
TITLE 55:	
Section 108	96
CONSTITUTION, 1901:	
Section 116	99
Section 280	19
Section 280	56
CORPORATIONS:	
Societies for Public Improvements—Personal liability of members	29
COSTS AND FEES:	
Case appealed and reversed, then pol prossed—	
Trial fee—Judgment fee	44
Clerk—Making transcript when probation revoked	89
Clerks—Recognizance	42
Justice of Peace—Inferior Court—Summon and proceeding to judgment	88
Sheriff's allowance for summoning jury in capital case—not costs	112

INDEX—Continued

	Page
Sheriffs—Inferior Court Fund—Dothan	24
Sheriff—Liability of Clerk for omitting item of cost	86
Sheriff—Serving notice in will probate	21
Sheriffs—Subpoenas—Guard fee—seizure fee—etc.	13
 COUNTIES:	
Alabama Citizens' Committee—Authority to appropriate for health and hospital survey	114
Bonds—Refunding—Exchange	96
Conveyances—Proper authority to execute deed	5
Sheriffs—Allowance for summoning jury in capital case	112
 COURTS OF COUNTY COMMISSIONERS:	
Clerk—May contract with counties	56
Conveyances—Proper authority to execute deed	5
 EXECUTIONS:	
Control of Judgment by owner—clerk	78
Judgment after ten years—revival	33
 FINE AND FORFEITURE FUND:	
County Treasurer—County Depository—Geneva County— Marshall County	40
Sheriffs—Costs—Subpoenas—Guard fees—Seizure fees—etc.	13
 GENEVA COUNTY:	
Fine and Forfeiture Fund—County Treasurer—County depository	40
 HEALTH AND HEALTH DEPARTMENT:	
Alabama Citizens' Committee—County Authority to appropriate to	114
Quarantine—Venereal disease—confidential records	46
Quarantine—Venereal disease—Detention home	64
 HIGHWAY DEPARTMENT:	
Public Utilities using roads and bridges for power lines—Rent	38
 HOMESTEAD:	
Exemption—Property redeemed from state	103
 HOUSTON COUNTY:	
Court of Common Pleas of Dothan—Sheriff—Fees	24
 INCOME TAX:	
Trust and Estates—Exemption	49

INDEX—Continued

	Page
INFERIOR COURTS:	
Mobile—Record—Duty of Clerk	93
INTOXICATING LIQUORS:	
Alcoholic Beverage Control Board—Retail liquor license—	
Discretion as to renewal	57
Condemnation—commission of circuit clerk	105
JUDGE OF PROBATE:	
Conveyances—Proper authority to execute deed	5
Rubber stamp signature	23
JUDGMENTS:	
Executions—controlled by owner—clerk	78
Executions—revival	33
JUSTICE OF THE PEACE:	
Fee—Summons and proceedings to judgment	88
LICENSES:	
Architects—Renewal Fee—not liable for while in army	118
Cooperatives—Mutual Farming or Trucking Association	76
Landscape Planter	121
Motor-bike	63
Motor Vehicles—motor truck or private car—Question of fact	83
MANUFACTURING PLANTS:	
Taxation—Exemption—abandonment of	91
MARSHALL COUNTY:	
Fine and Forfeiture Fund—County Treasurer—County Depository	40
MILITIA:	
Officers—leave of absence—sheriffs	99
MILK CONTROL BOARD:	
License—cooperatives—Mutual Farming or Trucking Association	76
MOBILE COUNTY:	
Inferior Courts—Records—control of judgment	93
MONTGOMERY COUNTY:	
Court of Common Pleas—fee for summons and proceedings to judgment	88
MOTOR VEHICLES:	
Licenses—Motor-bike	63
Licenses—Motor Truck—private care—Question of fact	83
MUNICIPALITIES:	
License—Landscape planter producing nursery stock and selling same	121

INDEX—Continued

	Page
MUTUAL FARMING OR TRUCKING ASSOCIATION:	
License	76
NURSERY STOCK:	
Constitutes farm products—Municipal license	121
OFFICERS AND OFFICES:	
Board of Revenue—Clerk—May contract with county	56
Military leave of absence—temporary official—right of appointment— tenure of office	99
OPINIONS OVERRULED, MODIFIED OR DISTINGUISHED:	
Biennial report of Attorney General 1926-28, Page 213	21
Biennial Report of Attorney General 1936-38, Page 349	112
PLANNING COMMISSION:	
Municipalities—method of creating	52
PRISONERS:	
Removal—sheriff—per diem	36
PUBLIC UTILITIES:	
Use of roads and bridges for power line—Rent	38
PUBLIC WELFARE:	
Authority of state department to act as agent of the Federal Government—War Emergency Program	8
QUARANTINE:	
Venereal disease—detention home	64
Venereal disease—records confidential	46
REAL ESTATE:	
Taxation—Improvements constructed by lessee	45
ROADS AND BRIDGES:	
Public utilities using same for power lines—Rent	38
RUSSELL COUNTY:	
Conveyances of county property—authority to execute deed	5
SCHOOLS:	
Education—Teachers—Increase in salary after budget adopted	116
City Board of Education—Director of counseling and placement— Superintendent emeritus	27
County Board—Authority to purchase scales	43
SHERIFFS:	
Costs—subpoenas—Guard fees—seizure fees, etc.	13
Fees—Inferior Court Fund—Dothan	24
Fees—Serving notice in will probating	21

INDEX—Continued

	Page
Liability of clerk for omitting item of cost—Fee for collection	86
Military leave of absence—term of office	99
Removing prisoners—per diem	36
Summoning jury in capital case—where paid from—not costs	112
SOCIETIES FOR PUBLIC IMPROVEMENTS:	
Personal liability of members	29
SOLICITOR:	
County—Office of Profit	19
“Suitable office provided”—lights and janitor	108
TAXATION:	
Ad Valorem—appeals—assessment on which tax must be paid	31
Exemptions—Manufacturing plants—foreiture of	91
Homestead exemption—property redeemed from state	103
Improvements constructed by lessee—realty	45
Income—Trust and Estates—Exemption	49
Redemption of part of land—certificate of purchase	73
TAX SALES:	
Certificates of purchase—rubber stamp signature	23
Redemption of part of land—certificates of purchase	73
TRUST AND TRUSTEES:	
Income Tax—Exemption	49
UNITED STATES:	
Public Welfare—Authority of State Department to act as agent for—War emergency assistance	8
VENEREAL DISEASE:	
Detention Home—Quarantine	64
WILCOX COUNTY:	
Bonds—Refunding—advertisement	96
WILLS:	
Probation—sheriff's fee for serving notice	21
WORDS AND PHRASES:	
Farm Products	121
Motorcycle	63
“Office of Profit”	19, 56
“Suitable Offices”	108